

Practical Challenges in Customary Law Translation

The Case of Rwanda's *Gacaca* Law

Téléphone Ngarambe



Organisation for Social Science Research
in Eastern and Southern Africa (OSSREA)

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Télesphore Ngarambe



**Organisation for Social Science Research
in Eastern and Southern Africa (OSSREA)**

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Dedication

To Charline

Cover Photo Caption: One of the *Gacaca* Courts While on Session.

SOURCE: <https://search.yahoo.com/yhs/search?hspart=mozilla&hsimp=yhs-006&ei=utf-8&fr=ytf1-yff13&p=gacaca%20photo&type=>

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Figure 1. Map of Rwanda before 1994

Figure. 2. Map of Rwanda after the 2000 Decentralisation Reform

Abbreviations and Acronyms

CNLG	National Commission for the Fight against Genocide
CPS	Crown Prosecution Service
EU	European Union
HRO	Human Rights Organisations
HRW	Human Rights Watch
ICTR	International Criminal Tribunal for Rwanda
LIPRODHOR	<i>Ligue Rwandaise pour la Promotion et la Défense des Droits de l'Homme</i>
MINIJUST	Ministry of Justice
NCO	Native Court Ordinance
NSGJ	National Service for the <i>Gacaca</i> Jurisdictions
NUR	National University of Rwanda
PRI	Penal Reform International
ST	Source Text
TIG	<i>Travaux d'Intérêt Général</i> [General interest work]
TT	Target Text

Foreword

There are a few remarks that a reader of this book entitled *Customary Law Translation in Rwanda: Practical Challenges* should not lose sight of. The first point is that not many people in the world know that Africa's customary law could be used to solve contemporary and contentious legal issues in the twenty-first century. The people of Rwanda unilaterally decided to go traditional, opting for a home-made legal system (*Gacaca*) instead of the western legal system that proved to be too cumbersome to adapt to the local situation. Thus, the entire world is compelled to know what Africa can offer in terms of its home-grown strategies in solving current problems. The Rwandan justice system known as *Gacaca*, though originally preserved by word of mouth, was revived, documented, tested and used successfully to handle millions of legal cases in the aftermath of the Rwandan genocide against the Tutsi.

Second, in his monograph, Télesphore Ngarambe identified some thorny challenges that any translator of legal documents can be faced with. He also provides some tangible solutions to those challenges. The book goes a step further to propose a translation model that should be followed in translating Rwanda's customary law.

In this context, Télesphore Ngarambe is not different from his predecessors in the field who have made attempts to conceptualise on translation studies. The skopos translation theory that was elaborated in the twentieth century brought in a new dimension for a general theory of translation that focused on text type, purpose and function where translation ceased to concentrate on static word-equivalence but incorporated elements of the context, participants and culture. This brought in other translation theories like that of Peter Newmark (1981) and of formal correspondence and functional equivalence by Eugene Nida (1964). The latter introduced linguistic and communicative dimensions to their translation theory.

The consequence of these shifts is that many theoretical frameworks have entered translation studies, because translation is borne out of many disciplines, such as comparative literature, and linguistics.

Practical Challenges in Customary Law Translation: The Case of Rwanda's Gacaca shows that translation involves language use and transfer as well as communication within a cultural setting. The author of the book amply demonstrates that nobody should downplay linguistic, textual, contextual and cultural cues in translation. He shows that the cultural turn in translation has transformed and re-conceptualised the translation theory

to integrate non-western thought about translation so as to challenge the presuppositions that have dominated the translation discipline since time immemorial. The major theme that runs through this book is that translation as a mediating form between cultures and contexts should not overlook cultural differences because language is a marker of identity.

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Preface

The ambition to produce a book on legal translation came to my mind fifteen years ago, on completion of my undergraduate studies. The knowledge I acquired inspired me to learn more about language as an intrinsic part of culture. Throughout my academic training, I have found that the best way of understanding broad concepts of language and culture is through pursuing translation and interpreting studies. The latter covers a wide range of disciplines and languages; it entails knowledge acquisition on cultural studies, communication, and specialised discourses in literature, law, economics and finance.

My two-year M.A. study in Translation at Witwatersrand University had both theory and practice orientations with emphasis on practical and technical skills in translation. I managed to cope with devising acceptable solutions in the translation of legal texts. I undertook a research project on legal translation dealing with the problems of non-equivalence using the Constitution of Rwanda as a case study. That was the time when the current Constitution of Rwanda had just been produced in Kinyarwanda and translated into French and English. A closer look at the target texts of that Constitution was enough for a keen scholar in the making to detect some unnatural structures inaccurately rendered into the above target languages. The results of my M.A. studies revealed that legal translation constitutes a vast sea any under-informed sailor cannot attempt to cross alone! Though I cannot claim to have exhausted all the non-equivalence problems embedded in the Constitution of Rwanda, I found that most translators tended to opt for 'zero' or 'omission' solutions to most translation problems they encountered in finding readily equivalent terms.

As a way of keeping truck of the legal specialisation in translation, I oriented my research efforts, including those of my students, to translating legal texts of various types. The most interesting of these was that of my student's dissertation on *Legal Terminology Used in the International Criminal Tribunal for Rwanda* by Lambert Havugintwari (2005). The study significantly raised my awareness on some translational challenges faced during the trials of Rwanda's genocide cases. Many other students' research projects, which I later supervised in the legal area, became major sources of inspiration and courage for me in pursuing my doctoral studies on *Practical Challenges in Customary Law Translation*, focusing on the Case of Rwanda's *Gacaca* law.

The choice of this research topic was not by accident. As a Rwandan, I had lived the ordeal that our country had gone through during the 1994 genocide against the Tutsi. Given that I never left my country, I became part of those Rwandans who experienced the dire consequences of the genocide. I was also part of those who were consulted, in one way or another, to contribute to finding solutions to consequences of the genocide. After the Government of National Unity adopted *Gacaca* as one of the solutions to deal with all pending legal genocide cases, I attended *Gacaca*

meetings at all levels, right from the process of information collection to the stage of public hearings. During these trials, judges applied *Gacaca* law and other guiding documents that contained terms that depicted Rwandan culture and setting. There were many people in the audience who could not easily access these documents because of their special nature. Yet, whoever visited Rwanda at that time expressed deep interest in taking a copy for further scrutiny.

After *Gacaca* proved to be a home-made solution to the wounds of genocide, different scholars got interested in it and undertook to conduct many research projects. Even though some of these studies made an attempt to shed light on the operation of *Gacaca* system, none of the researchers investigated the problems that were involved in its translation. This was so despite limited research on translating Rwandan laws.

It should be noted that in a multilingual country like Rwanda, translation is unavoidable. The main reason being that all official documents used in the country, including different types of laws, are presented concurrently in three official languages, i.e. Kinyarwanda, French and English, with each text claiming to enjoy faithful equivalence and authenticity. This implies that both translation and interpretation have a very important role to play in the drafting and dissemination of the majority of laws in the country. The *Official Gazette* and the Constitution of the Republic of Rwanda constitute two most eloquent examples in this regard. These and many other reasons prompted me to embark on a research project of this magnitude for my doctoral studies. The first deliverable from the above initiative was a thesis that I successfully defended in May 2014.

Following the call by OSSREA to support the publication of high quality dissertations in form of peer reviewed monographs, I worked on the dissertation and produced this book entitled *Practical Challenges in Customary Law Translation: The Case of Rwanda's Gacaca Law*. Now that what was a thesis research is turned into a book, I believe this is the right channel to reach a wider readership. My intended audience are all persons eager to comprehend challenges involved in the translation of legal texts, more specifically customary laws. Legal translation has always been complex; but it becomes much more daunting when dealing with customary laws. A case in point is translation of Rwanda's *Gacaca*, which is a hybrid law combining both tradition and modernity.

As the reader of this book, you may not need to go through it at once. It is an enjoyable piece to read, each part being informative on its own. The first three chapters will introduce to you the distinctive features of the main legal systems that came into play in the drafting and translation of the modern *Gacaca* law. In these chapters, I start by depicting the general picture of customary law to end with the specific legal systems involved in the production of the modern *Gacaca* law in three versions, i.e. Kinyarwanda, French and English.

In the light of the content of these chapters that constitute the configuration of the law under study, Chapter Four develops a theoretical paradigm underpinned by the conviction that the translatability of the modern *Gacaca* law entails a very complex process that requires integrating a number of dimensions: society, culture, language and context.

Chapter Five is the real culmination of all my endeavours gathered for many years to produce this book. Applying socio-cultural and contextual approaches, I identify and describe major challenges involved in the production and translation/interpretation of the *Gacaca* law. On the basis of both primary and secondary data, I suggest strategies to overcome the problems resulting from the differences between the traditional and modern *Gacaca*, as well as the French and English legal systems.

Considering the scope and context of this book, I can admit that its readership is not limited to academia. It is rather general knowledge and an important guide for legal practitioners, professional translators, legal drafters, communicators and any other reader interested in understanding the wisdom of the human tradition. Today, many people are claiming for the revival of indigenous knowledge and creation of home-grown solutions to the panoply of challenges facing humanity. This tremendous undertaking cannot bear fruit if people do not grasp properly the skills required to codify and translate these 'knowledges' and adapt them to the modern situations. In the case of *Gacaca*, I can assure my readers that I have tried to lay a solid foundation for effective exploration and exploitation of this system.

In other words, all who love justice can have their right share in this book. Most of you have many times denounced the failure of the international legal system to handle pending cases in different countries where mass killings have taken place, such as Rwanda, Burundi, Democratic Republic of Congo, Kenya, Sudan, Somalia and Chad. The blatant failure of the international legal apparatus has been incessantly reflected by the International Criminal Tribunal for Rwanda (ICTR) (2010), a court which was established and charged with handling all criminal cases related to the Rwandan genocide. In a span of 14 years, it completed only 36 cases. Nonetheless, the *Gacaca* courts were able to handle more than 700,000 cases in a period of 7 years! (<http://www.inkiko-Gacaca.gov.rw/pdf/abaregwa%20english.pdf>). This, therefore, implies that the translational solution I propose for this system that is so expeditious will inspire many other legal systems in the world.

I cannot pretend to have exhausted all the challenges involved in the translation of customary laws, however. It is also possible that I have not hit on all the problems that arose in the translation of *Gacaca*. However, my conviction is that this book will remain a main source of inspiration for those who would like to draft and translate laws. It will also enthuse

whoever will undertake writing on the diversity of customs and values that foreign influence and modernity have dumped in old memories to rot as their owners die. After this contribution, however modest it is, I think I should pledge to continue investigating into these systems to unveil their therapy to the many unhealed wounds that our fellow brothers and sisters suffer from throughout the world. This book reminds you that these wounds fester while waiting for foreign laws and judges under the umbrella of what is named 'international justice' that has always proven to be delayed justice.

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INTRODUCTION

“Given the complexity and difficulty of legal translation, one may wonder whether law is translatable and whether true equivalence can be achieved in legal translation” (Cao 2007, 31). This is one of the main statements that stimulated the work on this book entitled *Practical Challenges in Customary Law Translation: The Case of Rwanda’s Gacaca Law*. The author applies socio-cultural and contextual approaches to the translatability of some law-, culture- and context-specific aspects embedded in Rwanda’s *Gacaca*¹ law from Kinyarwanda into French and English. All the three are official languages of the country. The first is the sole Rwanda’s national language. The second is the coloniser’s language while the third was adopted through international cooperation and interaction with other countries in the contemporary world.

For years, translatability of legal texts has always been one of the major concerns for translators and specialists in translation studies. This situation becomes more complicated when dealing with texts that bear a lot of the society’s cultural and contextual elements. This is the case of the majority of legal texts used in countries as powerful instruments to regulate actions of their community members. The translation task becomes much more problematic when translating customary laws, which are products of traditional societies, and predominantly culture- and context-bound. Customary laws date back to the origins of human beings, and are as diverse as the human communities. Examples of these include: the *Ukgotla* in South Africa, the *Warlpiri* laws (one of the indigenous Aboriginal laws in Australia), the *Sharia* law in the majority of most Islamic countries, *Fewuse Menfessawi* in Ethiopia, *Dina* in Madagascar, Ashanti traditional tribunals in Ghana, the *Barotse* law in Zambia, the Laws of *Lerotholi* in Lesotho, and *Gacaca* of Rwanda that is the main focus of this book.

Gacaca is a Kinyarwanda word that normally refers to a type of grass or a traditional lawn where people could sit to discuss different issues or settle disputes. From the definition given by the Kinyarwanda dictionary by Bizimana and Rwabukumba (2011), we can retain only two main aspects: place and mediation. In a more legal context, Mangquku (2004:10) considers *Gacaca* metonymically as a traditional court where perpetrators and victims resolve their differences before a community and a panel of eminent persons. Sources also attest that *Gacaca* is a customary law that was the only legal system used in Rwanda before the arrival of colonisers in the early 20th century.

According to Vanhove (1941), the sole Rwanda’s customary law *Gacaca* consisted of societal regulations on succession, marriage, obligations and contracts. In accordance with *Gacaca*, the King was the supreme authority of the country invested with all the powers, including the judiciary as the highest judge to adjudicate on all judicial matters. However, at that time, most criminal and civil matters were settled between friends and families in

the *Gacaca* system. The primary objective during these *Gacaca* sessions was, in addition to ending the violation of shared values, to restore the social order by reintegrating those who had transgressed within the community. As specified in a document entitled 'Integrated Report on *Gacaca* Research and Monitoring' (Penal Reform International (PRI 2005, 12), the principal goal of *Gacaca* was thus "neither to determine guilt nor to apply State law [...] but to restore social harmony and social order in a given community and to re-include the person who was the source of the disorder."

Nonetheless, before 1994, Rwanda had never experienced a crime as serious and deadly as that of genocide. As defined by the United Nations in 1948, genocide means any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group (historyplace.com). The 1994 genocide was the deadliest of all the 20th century mass killings, for it took away the lives of 1,364,020 persons (Chavanieux 2000) in a period of one hundred days. During this tragedy, the country was completely devastated, and nearly three million people were forced into exile. Institutions responsible for law enforcement, such as the justice system, the courts, the police and administration ceased to function for about 3 months. All prisons throughout the country became overcrowded — over 120,000 persons (PRI 2005, 10) — with many other untried suspects. Since so many people were directly or indirectly involved in the killings during the Rwandan genocide, the Government of National Unity, established in July 1994, believed that peace and unity could only be achieved by striking at the root causes of the genocide and, in particular, the "culture of impunity".

To solve all the judicial problems resulting from the genocide, the government of Rwanda therefore resorted to its traditional way of handling cases. This option was motivated by the fact that the conventional courts in the country were limited both in number and capacity, and, worse still, they were overwhelmed by exponential number of genocide suspects. In addition, some cases that could be prosecuted in foreign countries to which a significant number of genocide suspects had fled, notably in Belgium, Canada, France, etc. were not handled satisfactorily.

As stated in PRI (2005), as of June 30, 2005, the International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania, had managed to try only 24 out of 60 cases over a span of eleven years. Five years later in April 2010, the situation had not improved. According to the ICTR detailed report on the status of its detainees, out of 80, only 48 cases of detainees had been handled to completion (ICTR 2010).

Moreover, many analysts have estimated that, at the rate of around 1,000 verdicts per year in Rwanda's conventional courts, it would have taken more than a hundred and twenty years to try those cases. In addition to the length of time, there were many other problems that included:

- little possibility of knowing the truth about what had happened;

- keeping and taking too many people in prisons with no charge or trial;
- possible impunity for some of those who had committed genocide; and
- innumerable financial and material means.

To overcome these challenges, Rwandans revisited their tradition and drew their inspiration from their traditional legal system, which was deemed to be less costly, more efficient and expeditious than the modern one. In that respect, the *Gacaca* system, traced back in history before the colonial rule, was identified. After wide consultations with different strata of the Rwandan population, this traditional participatory judicial system was found to be one of the best remedies to heal the wounds of the Rwandan society. Most of these consultation fora are described in ‘Integrated Report on *Gacaca* Research and Monitoring’ as follows:

The ‘Saturday talks’ created and piloted by Pasteur Bizimungu, the former President of Rwanda -with the collaboration of representatives from the government and from civil society- led, in October 1998, to the creation of a commission mandated to study the possible application of *Gacaca* to genocide trials. (PRI 2005, 13).

In the terms of Ingelaere (2008, 3), Rwandans “turned their attention to their legacy of indigenous [ways] of disputes settlement and reconciliation”. The *Gacaca* courts were therefore officially established for the first time by the Government of Rwanda (GoR) in 2001 by the Organic Law No. 40/2000 of January 26, 2001 (GoR 2001a) which underwent a number of amendments as reflected in the Organic Law No. 16/2004 of June 19, 2004 (GoR 2004). The law was drafted in Kinyarwanda and translated into English and French to facilitate its comprehension by a wider audience, including the international community.

Even though the system of *Gacaca* has been severely criticised by some national and international bodies on account of being fraught with a number of pitfalls,² such as the use of inexperienced, minimally trained judges dealing with complex cases, possibilities of false accusations or confessions, revenge or fear of revenge and inconsistent application of the law, it has achieved some tremendous results. Thousands of people have been punished, others have been freed, and more importantly, Rwandans and the international community have known some truth about how the Rwandan genocide was planned and executed. *Gacaca* has also been hailed as a voice and a therapeutic catharsis to genocide survivors and the whole society— this is stressed in a documentary by the United States Institute of Peace (2002), with the work entitled, “*Gacaca*, Living Together Again in Rwanda?” Furthermore, this system is serving as a lesson to some nations, especially in Africa, where similar atrocities have been experienced. Some cases in point such as Sudan, Sierra Leone, Somalia and Burundi are denounced in “Amnesty International Report 2014/2015: Africa Regional Overview”. In addition, a number of research individuals and institutions, mainly United States Institute of Peace (2002), International Crisis Group

(2008), and Huyse and Salter (2008) have recommended similar home-grown solutions such as Rwandan *Gacaca*, the Ivorian *audiences foraines*, and the South African 'Truth and Reconciliation Commission', as a durable way out of different ramifications of conflicts in Africa.

However, despite all these achievements, probably not exhausted in this book, some nations and organisations continue to inquire into this judicial system that helped Rwanda to cope with the dire consequences of genocide in terms of justice. Countless articles and books that have been produced on Rwanda's *Gacaca* are well noted by Huyse and Salter (2008, 1). Arguably, one of the main reasons that are still hampering this inquiry is that the translation of *Gacaca* has not been accurate enough to shed light on the system. In addition, to the best of my knowledge, there has not been a book-length treatment of the challenges encountered in the translation of customary laws, more specifically, Rwanda's *Gacaca*; a legal system that has attracted people's attention worldwide.

The translation of the *Gacaca* law into foreign languages, such as French and English implies confronting different legal language systems. The Rwandan traditional legal system differs significantly from other legal systems in terms of procedures, structure, terminology, and administration. The modern *Gacaca* system combines both tradition and modernity for, in the past, the proceedings were mainly oral — without any codified provisions — and jurisprudence-based. Traditionally, the system was resorted to whenever social norms were violated or whenever conflicts arose (land disputes, damage to property, marital problems, and struggles over inheritance), and the parties were brought together during informal and non-permanent sessions presided over by *inyangamugayo* (a concept that is referred to as *elders* by some writers) which literally means "those who detest disgrace". However, this gloss can be misleading in that the term *elder* does not necessarily imply all the semantic features of the Kinyarwanda term *inyangamugayo*. The term is semantically complex and is loaded with the following implied qualities: maturity, honesty, equity, trustworthiness, dependability, truthfulness, and more other moral values constituting the Rwandan socio-cultural moral and ethical standards. The Kinyarwanda term *inyangamugayo*, thus, refers to one or many persons who meet the above required qualities as determined by the Rwandan socio-cultural moral and ethical standards.

Today's *Gacaca* is an adaptation of the traditional one, involving innovative mechanisms of transitional justice. It aims, among other things, at meeting the exceptional challenges of prosecuting and trying exponential numbers of genocide suspects. In its implementation process, there have been some legislative changes to support the chosen empirical attempts to respond to the limitations and obstacles encountered. Like the former, the current *Gacaca* embodies participatory justice while also aiming to achieve the goal of repairing the social fabric. Nevertheless, today's *Gacaca* differs

considerably from its original model in as much as it handles serious crimes, such as genocide.

All these factors make the translation of this legal system into foreign languages very complex. Even in normal circumstances, legal translation is not easy especially when involving more than two languages that reflect different cultures and world outlooks. The few research reports (Ngarambe 2004; Muneza 2006; and Niyitegeka 2007) that have attempted to study the translatability of other Rwandan laws point to the fact that Kinyarwanda does not have enough appropriate terms to refer to a significant number of the legal concepts expressed in both French and English. Yet, especially in the case of Rwanda, the three languages have to coexist and interact through translation. However, in this book, I present even a more different scenario where we need to translate the legal system that bears a lot of Rwandan tradition-bound concepts and practices to suit other different systems and settings.

The main aim of this book is therefore to identify, describe and translate these legal aspects in their socio-cultural context and eventually suggest some solutions which shed more light on the relevance and meaning of these problematic areas. More specifically, it applies theoretical approaches related to ideology as developed by Thompson (1984). One of the principles underlying this theory is that “it is through language that meaning is mobilised in the social world”. The book also leans on the aspects of meaning, context and reality construction (Nida 2001; Nord 1997 and Katan 1999). According to Katan (1999, 90), “reality is what our language says it is”. Additionally, since the *Gacaca* texts are legal in nature, this study draws on a similar approach as suggested by Alcaraz and Hughes (2002, 37) to be applied in legal translation: “the selection of the best, or the most appropriate, or the most natural or effective term will always depend also on other factors, such as context, traditional usage, genre and even subgenre”. In this regard, the analysis of the *Gacaca* law makes use of extralinguistic context that Alcaraz and Hughes (2002, 37) classify as the third head of context. This extralinguistic context consists of “habits, expectations and conventions characteristic of the society concerned”. In the case of *Gacaca*, these aspects refer to the world of lawyers and the law, with its customs, its practice, its assumptions, its values and procedural routines.

In this regard, though originally applied to literary translation, the content of this book is inclined towards post-colonial translation approaches developed by two translation studies scholars in their rapprochement between cultural studies and translation studies under what they termed a “cultural turn” in translation studies (Bassnett and Lefevere 1990; and Lefevere 1992). In this approach, Lefevere (1992, 17) views language as “the expression and repository of a culture”. In the same line, (Lefevere and Bassnett 1990, 8) envisage that “neither the word, nor the text, but the culture becomes the operational ‘unit’ of translation”. Particularly, the book

exploits theories of culture in relation to language (Boas 1986 and Steiner 1998). Boas (1986, 7), for example, argues: “the form of the language will be moulded by the state of that culture”. The importance of culture in the area of translation finds its justification in the Iceberg Theory developed by Hall in his *Silent Language* (1990). All these theoretical dimensions intersect into a fusion of cultural and translational studies that has a useful contribution to make to the aims and objectives of this book.

Epistemologically, the methodology of this book follows the principle of deductivism, in which according to Bryman (2008, 13), the purpose of theory is “to generate hypotheses that can be tested and that will thereby allow explanations of laws to be assessed”. In addition, an ontological position of constructionism is adopted in order to devise better techniques to apply to the translatability of customary laws, particularly the *Gacaca* law, which has been transformed to meet the current social needs. According to Bryman (2008, 19), the ontological position asserts that “social phenomena and their meaning are continually being accomplished by social actors. It implies that social phenomena and categories are not only produced through social interaction but are in a constant state of revision”. The constructionism position adopted in this book sees the *Gacaca* law as a product of culture and as “an emergent reality in a continuous state of construction and reconstruction” (Bryman 2008, 20). The following lines from Becker (1982, 521) can help to explain my stand clearly:

People create culture continuously ... No set of cultural understandings ... provides a perfectly applicable solution to any problem people have to solve in the course of their day, and therefore must remake those solutions, adapt their understandings to the new situation in the light of what is different about it.

Furthermore a multi-thronged methodology is espoused in the collection of both primary and secondary data. The basic approach adopted in this book is qualitative, which implies that, as suggested by Williams and Chesterman (2002, 65), it often necessitated empathy from the researcher (e.g. interview) and imagination (e.g. in discourse analysis).

It is very important to note here that the study does not pretend to generalise the views collected from the selected informants. Sample representativeness was not my main objective. Instead, the results presented in this book are based on the informants' understanding, explanation and interpretation of the identified areas of translation difficulty in *Gacaca* law. Primary data is, therefore, qualitative and was collected by means of an interview guide administered to 30 informants purposively selected at different categories as detailed in Table 1.

Table 1. Informants, their categories and selection criteria

Category	Selected institutions and individuals	Selection criteria	No. of informants
Government institutions	Ministry of Justice (MINIJUST)	Law drafting and implementation	1
	Ministry of Sports and Culture	In charge of culture	1
	National Service for the <i>Gacaca</i> Jurisdictions (NSGJ)	The <i>Gacaca</i> law implementation	1
	National Commission of Human Rights	Investigation and follow-up of human rights violations	1
	National Commission for the Fight against Genocide (CNLG)	Fight against genocide	1
	National Bar Association	Legal defence	1
Private institutions	Amnesty International	International organisation in charge of human rights defence	1
	Human Rights Watch	International organisation in charge of human rights defence	1
	<i>Ligue Rwandaise pour la Promotion et la Defense des Droits de l'Homme</i>	National organisation in charge of human rights defence	1
	LIPRODHOR		
	<i>Inteko Izirikana</i>	Wisdom and preservation of Rwandan culture	1
Individuals	Linguists	Language expertise	3
	Lawyers	Law expertise	3
	<i>Gacaca</i> judges	The <i>Gacaca</i> law implementation	3
	Historians	Knowledge about past developments and experiences	3
	<i>Gacaca</i> judges	The <i>Gacaca</i> law implementation	3
	Historians	Knowledge about past developments and experiences	3
	Sociologists/anthropologist	Knowledge about development, organisation and functioning of human society	3
	Other knowledgeable persons	General knowledge about Rwandan, English and French culture and history	5
Total Number			30

As presented in Table 1, in the sampling process, I only selected categories of people at the institutional and individual levels with a direct link to the subject under study. In this respect, among government institutions, the following structures were selected for the reasons provided here:

1. Ministry of Justice: it spearheads law drafting and implementation, and collaborates closely with NSGJ for the latter is one of the Ministry's semi-autonomous agencies.
2. Ministry of Sports and Culture: it is in charge of all matters related to culture in the country.
3. National Service for *Gacaca* Jurisdictions (NSGJ): It is the state organ in charge of coordinating *Gacaca* courts and the *Gacaca* law implementation.
4. National Commission of Human Rights: it is a semi-autonomous agency under the supervision of the Ministry of Justice in charge of "investigating and following up human rights violations committed by anyone on the Rwandan territory, especially the State organs and individuals under the cover of the State organs as well as any national organisations working in Rwanda".
5. National Commission for the Fight against Genocide (CNLG): is an independent and permanent institution whose mission, among others, is to put in place a permanent framework for the exchange of ideas on genocide, its consequences and the strategies for its prevention and eradication.

Private institutions selected included: the national and international organisations in charge of culture, law implementation and human rights; American National Bar Association; Amnesty International; Human Rights Watch; LIPRODHOR; and *Inteko Izirikana* (a Rwandan Association of Wise and Elderly Persons). Among the category of individuals, I selected linguists, lawyers, *Gacaca* judges, historians, sociologists and other resource persons in the field. Another source of primary data was different organic laws governing the *Gacaca* courts as published in the *Official Gazette* of the Government of Rwanda. The main ones included:

- Organic Law No. 33/2001 of 22/06/2001 setting up "*Gacaca* Jurisdictions" and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 1994 [The Law was drafted in three versions: Kinyarwanda, French and English].
- Organic Law No. 16/2004 of 19/06/2004 setting up "*Gacaca* Jurisdictions" and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 1994 [The law is in three versions: Kinyarwanda, French and English].

Organic Law N° 13/2008 of 19/05/2008 modifying and complementing Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of *Gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date [The law is in three versions: Kinyarwanda, French and English]. After scrutinising the three organic laws, it was found that the organic law No. 16/2004 of June 19, 2004 as amended to date is the main law. The organic law No. 40/2000 of 2001 is the initial law that guided the pilot phase of the *Gacaca* process, whereas the third and others that were enacted later came as amendments or complements to the one of 2004. Still in the review process, it was established that the law is produced in the three official languages used in Rwanda (i.e. Kinyarwanda, English and French). Following the parallel presentation of the three versions and the naturalness of the Kinyarwanda version, Kinyarwanda was determined to be the source language. This was confirmed by the Legal Adviser from NSGJ during the interview phase. This implies that the two versions in French and English are the target texts.

In the source text review and analysis, the study applied socio-cultural, ‘intertextuality’ and ‘interdiscursive analysis’ approaches as respectively advocated for by Williams and Chesterman (2002), Bryman (2008), and Fairclough (2003a) in order to overcome possible challenges encountered in the translation of the *Gacaca* law that combines both tradition and modernity. The prime rationale behind the confinement of this book within the boundaries of all these theories is to construct an integrated theory particularly suited to the purposes of the book while at the same time ‘testing’ Euro-American theoretical ideas against the Rwandan context, thus constituting a breakthrough in the translatability of the *Gacaca* law, and/or, by extension, of other similar customary laws. The secondary data were extracted from soft or hard relevant reading materials. Most of these documents are related to translation studies with emphasis on legal translation, customary law in general, the Rwandan, French, and English legal systems, and the international law on the crime of genocide. The analysis applies a socio-cultural approach to triangulate all the data collected. This helped to improve on the existing target texts, and where possible, formulate some grounding information to shed some light on the identified areas deemed to cause some misunderstanding to the target audience who are not conversant with the *Gacaca* system. By doing so, the socio-cultural approach I devised is in conformity with the recommendation by Newmark (1988, 23): “to supplement the linguistic level, the text level with the referential level, the factual level with the necessary additional information (no more) from this level of reality, the fact of the matter”. While applying the socio-cultural and contextual approach to translate the *Gacaca* law provisions from Kinyarwanda into English and French, the book focuses on the following main areas: *Gacaca*’s traditional and modern

legal aspects; and socio-cultural and contextual aspects incorporated in the *Gacaca* law. It was discovered that, due to the hybrid nature of the modern *Gacaca* law, all of the aspects identified under these themes constitute huge challenges for translators. The law combines both traditional and modern legal aspects the translation of which requires an in-depth analysis of the socio-cultural context in which the law was produced. As a solution, besides a number of adjustments to be made in the body of the text, some grounding information at the beginning of each problematic provision to shed some more light on its meaning and context was found to be indispensable.

The book is organised along the four specific objectives that guided this study. Those were to:

1. establish distinctive features of indigenous customary law;
2. provide an overview of distinctive features of the Rwandan, French and English legal systems;
3. analyse and describe *Gacaca* texts in their socio-cultural context;
4. identify and describe the challenges involved in the translation of some traditional and modern aspects selected in the *Gacaca* law, and devise alternative translation techniques that the researcher felt are likely to facilitate a better understanding of the *Gacaca* system.

To begin with, **Chapter One** describes the main features of customary laws. Starting from the meaning and scope of the legal system in question, the chapter presents major aspects shared by customary laws in different parts of the world, more specifically in Africa. **Chapter Two** singles out the Rwandan legal system that constitutes the source system of the *Gacaca* law. **Chapter Three** describes the target legal systems (French and English) involved in the *Gacaca* law translation in terms of their sources, court structure and competence. **Chapter Four** introduces major approaches adopted to investigate the translatability of *Gacaca* namely socio-cultural and contextual approaches. Finally, **Chapter Five** is the core of the book. It adopts the socio-cultural and contextual approach to the analysis and translation of the selected aspects embedded in the modern *Gacaca* law deemed to cause problems in its translation into French and English.

¹ The Kinyarwanda word is pronounced as follows: [ga' tʃaatʃa]

² For further accusations levelled against the *Gacaca* system you can see for example the report *Rwanda: Justice Compromised; the Legacy of Rwanda's Community-Based Gacaca* (2011) by Human Right Watch.

CHAPTER ONE

Distinctive Aspects Common to Customary Laws

1.1. Meaning and Scope of Customary Law

The terms ‘indigenous’, ‘native’ and ‘customary’ can be interchangeably used to qualify a body of laws that are based on a traditional judicial system of a given society. There has been continuing ambiguity in the terminology used to refer to these types of laws. McRae, Nettheim and Beacroft (1997, 126) spotted out this ambiguity: “In the face of compelling anthropological evidence and in the context of the contemporary retreat from epistemological constructs based in cultural imperialistic paradigms, judges and commentators alike have increasingly supplemented the more patronising and perhaps demeaning concept of native ‘custom’ with the recognition of ‘laws and customs’ or even hybrid ‘customary law’”. According to *Oxford Dictionary of English* (2010), something or someone is ‘native’ when it is “associated with the place or circumstances of a person’s birth”. In this case, the concept ‘native law’ would mean the law that belongs to the place where someone was born. The same dictionary refers to ‘indigenous’ as something or someone “originating or occurring naturally in a particular place”; whereas, when referring to law, ‘customary’ means “established by or based on custom rather than common law or statute”. Looking at these definitions the ambiguity remains. A species can belong to a place when it did not naturally originate in the same place. In my understanding, in the case of laws, modern or traditional, all of them belong to or originated from a given place or society. For the purpose of this book, I find ‘customary’ more suited to refer to laws that were established by or based on custom or tradition in a given society. In this regard, the terms ‘customary’ or ‘traditional’ as opposed to modern or statute law are used throughout to remove any ambiguity. Since its existence, each community has its own traditional legal system that is used to settle disputes among its people. No single community could dispense with a judiciary system for, as the Kinyarwanda saying goes, *ahari abantu ntihabura urunturuntu*, which translates in English wherever human beings live, there are always frictions. Like any other continent, Africa does not have only one customary law. There are as many customary laws as there are tribes and regions in Africa. These laws differ from community to community. Even in a single region, where there are many scattered tribes, each of these may have its own customary law. Lewin (1971, 103–104) stresses this diversity of customary laws in Africa:

[T]here are innumerable native tribes scattered all over the continent and varying in number from a few hundred people to a million or more. Each of these tribes may be described as having its own body of customary law. Some tribes and their laws are related to and resemble their neighbours’ or other tribes further afield, but often enough neighbouring tribes are ethnically different and culturally distinct, and they also speak unrelated

languages. Moreover, these tribal differences by no means correspond with the international boundaries drawn on the map.

This implies that the level of resemblance of these laws does not necessarily have anything to do with proximity and contact between the systems or even the languages spoken by the groups. That is why translation will always be needed to understand any single system. Another important element about these laws is their frailty. Referring to Australian indigenous law, Lewin (1971, 105) observes that in some respects, “these customs are taught and tenaciously observed; but in other respects they are fragile and easily abandoned or drastically modified under the pressure of European influence”. This is the same fate for all other similar systems in any other country, which failed to resist any foreign influence including Rwanda's *Gacaca* law whose development and transmission was totally obstructed by the modern formal law brought by the Europeans.

In addition, most of these laws are a public property; i.e. they are accessible to every member of society. However, others are private property being a monopoly of a certain group of knowledgeable persons. This is what has been found by the New South Wales Law Reform Commission (2000): “there is secrecy surrounding many of the laws, some of which are sacred and not to be spoken about to anyone, except the members of the relevant tribal group”. The diversity of customary laws complicates the possibility of finding one common definition for it. As a result, some researchers simply content themselves with generalising their common characteristic, namely a product of oral culture transmitted from generation to generation. This is underscored by Bennet (2004, 2) as follows: “the most striking of nearly all customary laws is the fact that, in their original form at least, they are unwritten”. In the case of the Rwandan customary law, as Verdickt (1979, 16) stresses that its transmission relied much on the memory of well selected persons and total use of word of mouth:

Les règles qui organisaient la transmission du rituel royal dans le Rwanda ancien attestent la grande importance qu'on y attachait. Le texte était confié à la mémoire d'un certain nombre d'individus dont chacun était en règle générale responsable d'une partie de tradition, seulement selon les indications données par le roi.

[Rules governing the organisation of the transmission of the royal ritual in ancient Rwanda prove the importance attached to this issue. The text was entrusted to the memory of some individuals each of whom was in general responsible for a part of tradition, only in accordance with the instructions from the king]¹

Verdickt (*ibid.*) citing the Rwandan historian and philosopher Bishop Alexis Kagame further expounds the faithfulness of the memory of the *abiru* [ritualists of the court], traditional law keepers, and the rigidity it required to preserve Rwandan traditional law:

La vie d'un umwiru dépendait de la fidélité de sa mémoire. Le roi organisait des séances de récitation du texte. [...] Ces examens avaient lieu en présence de ritualistes qui connaissaient aussi les passages faisant l'objet de la déclamation. [...] Ces contrôles officiels de la mémoire des abiru et la menace d'une peine extrêmement grave en cas de négligence semblent toutefois avoir été de nature à garantir une transmission soignée du texte.

[The life of *umwiru* depended on the reliability of his memory. The king organised some recitation sessions. [...] These exams were held in the presence of ritualists who knew the excerpts that were subject to declamation. [...] These official tests of the memory of *abiru* and threat of very serious sanctions in case of negligence contributed, in most cases, to accurate transmission of the text].

Still as the term may suggest, customary laws are based on customs. Verdickt (1979, 108) refers to custom as constant usage respected by members of a given community: “*La coutume est usage constant et incessant, respecté par les membres d'une collectivité comme nécessité sociale et considéré comme ceux-ci comme ayant force obligatoire*”. Verdickt (*ibid.*) goes as far as saying that custom has always influenced the law, during and after the latter's codification process:

Marginale actuellement la coutume a cependant profondément influencé la vie du droit. Les processus de codification de la coutume et de son unification ont littéralement hanté les pouvoirs centralisateurs. [...] La coutume procède à chaud de faits sociaux composites. Elle ne découle nullement d'une volonté étatique quelconque, elle puise ses racines dans une pratique répétée. [Though marginal today, custom has had a considerable influence on the life of the law. The codification processes of the custom and its unification entirely haunted centralising powers. [...] Custom is built on a composite of social facts. It does not at all derive from the will of the State, but instead, it is rooted in repeated practices].

Furthermore, using the term “Aboriginal law”, Eggleston (1976) identifies another important aspect that can be added to the definition of the concept “customary law”: “[The Aboriginal] law and religion were intimately bound up in Aboriginal society [...] and any attempt to identify certain segments of Aboriginal life as “legal” involves the imposition of alien categories of thought on the tribal society”. In Eggleston's view, defining this type of law requires adopting a ‘functional approach’ for the law was encoded in each group's religious tradition and was used as an instrument of social control and change. For this to be possible, the customary law needs to accommodate tradition and modernity:

Laws of this nature [...] are, at one and the same time, both young and old. Although the legitimacy of custom depends on its age, customary law is always up to date, because, ancient though it may seem, no custom is ever older than the memory of the oldest living person. Systems of custom

therefore have the remarkable ability to allow forgotten rules to sink into oblivion while simultaneously accepting new rules to take their place, always on the understanding that the new is old (Bennet 2004, 2).

The hybridisation (between tradition and modernity) of these laws is facilitated by the oral nature that makes them, in the terms of Bennet (*ibid.*), more “porous and malleable”. Pushed to its logical conclusion, his analysis disqualifies the existence of such laws for not being clearly defined:

Because they have no clear definition, it is difficult to differentiate one rule from another, and in consequence, to classify rules according to types. If rules cannot be classified they cannot be arranged into a system, and without the discipline of a system, rules may overlap and contradict one another. In fact strictly speaking, the oral versions of customary law should not be called systems at all. They are probably better described as repertoires, from which the discerning judge may select whichever rule suits the needs of the case (Bennet 2004, 2).

This does not exactly match the modern *Gacaca* law, which was codified and turned into a body of law to suit the context of the post-genocide period. However, in its codification process, *Gacaca* preserved some vestiges of the traditional *Gacaca* including the use of untrained judges. Unlike the written laws, which require a group of specialists for their implementation, the customary laws do not require formally trained judges for their application. “[No] group of people is devoted to the application, interpretation or making of rules” (Bennet *ibid.*). Law then develops into an esoteric discipline that is moved beyond the reach of ordinary people. Nonetheless, Verdickt (1979, 113) sees this differently. According to him, in all traditional societies there were experts who would be required to interpret the law in case of difficulty: “*En réalité et en cas de difficulté d’interprétation, l’ensemble des sociétés coutumières ont à leur disposition des spécialistes “diseurs de droit”*”. [In reality and in case of interpretation difficulty, all customary societies resort to specialists known as “law orators”]. Finally, customary rules are structured differently from modern ones, which are structured as per the Western legal model. As Bennet (2004, 3) specifies, modern laws require “a stable and certain code of rules that can be constantly applied to the facts of a variety of different cases”. In his view, despite the vagueness of oral law, customary law must, like any law, meet a minimum requirement of certainty if it is to be effective in maintaining order. Normally, oral cultures achieve this end through various social and stylistic controls on the transmission of information.

1.2. Distinctive Features of Customary Law

Customary law is characterised mainly by its dynamism to accept change and its adaptability to new situations of the people that it serves. These changes are reflected in its hybrid nature that combines both tradition and modernity. However, it still embodies most of its traditional elements in its procedure that include, among others, the use of eminent persons in the

community without the intervention of lawyers. As in the case of *Gacaca*, these eminent persons stood out in the management of their society's legal system due to their elder age, wisdom, knowledge of the tradition, dependability and impartiality. Like any other living body of law, and as Verdickt (1979, 118) reveals, the native law is a dynamic entity and changes rapidly with time: "*Il serait erroné de considérer le droit coutumier comme statique. L'examen des différents secteurs du droit révèle une réelle transformation du droit coutumier*" [It would be erroneous to consider customary law as static. The study of different types of laws reveals a real change of customary law]. Ruhashyankiko (1977, 61) clarifies the adaptability of customary rules to new contexts in society in these terms: "*Le droit coutumier est évolutif. Toute règle coutumière se modifie et s'adapte aux situations nouvelles*" [Customary law is evolutionary. Each customary regulation changes and adapts itself to new situations]. That is why, as Lewin (1971, 10) suggests, the process of reducing varied customary laws from different tribes should take into consideration the dynamism factor. In this regard, "the real purpose of recording should be to provide the basis on which bodies of tribal law may be developed towards a Native Common Law that will be Union-wide in its application". The coding of the system should appropriately adapt it to meet the current situations and challenges that facilitate its application. This is what the production of the new legislation by the South African Department of Native Affairs intended: "the flexible adjustment of Native law and tribal regulation together with appropriate machinery for its application" (Lewin 1971, 15). The same aim is stressed in the comments by the President of the Transvaal and Natal Division of the new Native Appeal Court on the new courts that were set up:

[...] system of judicature embodying simple and convenient forms of procedure, stripped as far as possible of legal niceties and technicalities, designed to meet the needs of the situation, one of the central ideas of which is to bring the legal machine within easy reach of, and accessible to, the highest as well as the lowest member of the Native Community, with comparatively little expense (Lewin 1971, 15).

At the same time, the President of the Court mentioned above pointed out that the legislature sought to bring into being forums — Courts of Native Chief, Native Commissioner, and of Appeal — designed to suit the psychology, habits and usages of the Bantu, creating as nearly as possible the atmosphere of the *Ukgotla*, to the arbitrament of which they were, from time immemorial, submitting their disputes to. According to Lewin (1971, 15) while an attempt has been made to create forums and forms of practices and procedures approximating to Bantu conceptions of legal jurisprudence, the system has been made sufficiently flexible to meet the needs of the native who has emerged from a tribal state to a wider and more "enlightened" structure of Western civilisation and its system of legal jurisprudence. The most important contributors to the adaptation of customary law are judges whose roles are to administer, interpret and apply

the law. Throughout the process, judges create the law, and this is what Ines quoted by Koyana and Bekker (1998, 9) declares about the South African customary law:

It is the duty of a court to administer a living system of law as to ensure without the sacrifice of fundamental principles, that it shall adapt itself to the changing conditions of the time and it may be necessary sometimes to modify or even to discard doctrines, which have become outworn.

This adaptation is part of a social process that, according to Lewin (1971, 21), anthropologists refer to as “culture contact”. He emphasises the unavoidability of the process as follows: “none but those who blind themselves to the most powerful social forces in our mindset can seriously doubt that this process will continue, at least for a time as far ahead as practical men can see”. Customary laws, like any other body of law, did not undergo changes only during the colonial period when African culture experienced unendurable shock from the Western cultural attack. In this line, Gluckman (1969,– 9) states: “Not only are customary laws changing today but also they were subject to constant change in the pre-colonial past”. Stressing this change, Gluckman (1969, 9–10) adds:

It has been established that African customary law, like any system of law, consists of a variety of different types of principles, norms, and rules. Some of them state wide and general principles of morality and public policy to constitute an apparently enduring ideological framework for justice. Such principles of wide connotations stated multifocal terms covering many referents or wide range of action are flexible and can be adapted to changing conditions and standards.

To meet the ever-growing challenges of their times, African natives had no choice but to adopt some aspects of the Europeans law to adjust their legal system to new economic realities of their lives. With time, new sorts of crimes came in and there was a need to find laws that could help handle them. The reason was that the existing native laws could not fulfil the required task. As an illustration, Lewin (1971, 21) lists a number of cases of action that did not exist in the traditional society but could bring natives to courts of law in South Africa: money lent, goods sold, services rendered, possession or ownership claimed of an article such as a bicycle, a musical instrument or a piece of household furniture, claims arising from insurance policy and contracts of all kinds. In the view of Koyana and Bekker (1998, 9), this socio-economic change also significantly influenced the South African legal reform, and this was unavoidable: “[I]t is appropriate that customary law should be adapted to the requirements of our society which is undergoing rapid economic and social change and development”. Similarly, Lewin (1971, 25) expressed: “[A]lthough when they took over the Cape in 1806, the British agreed to maintain existing judicial institutions, they found these to be inadequate, particularly to cope with the new and growing commerce”. Though this phenomenon of change did not carry the same magnitude in all sectors, it was not exclusively limited to

some less developed parts of the world. In the same context, after reviewing some studies of African customary courts, Gluckman (1969, 10) concluded:

Studies of African customary courts show that adaptation is easier in some fields than in others [...]. The problem of these courts is not different from the problems which have faced, and face courts elsewhere in the world: in Europe and America judges have been guided by changing principles of justice, public policy, and morality, as socio-economic conditions have altered, to amend the definition and application of legal rules where they could do so.

Nonetheless, this change and foreign influence should not always be viewed in negative terms. It may even be beneficial to the receiving system, as was the case of the English legal system:

If the Anglo-Saxons had, after the Norman Conquest, been able to keep their laws from Norman influence, they would have succeeded only in retarding the social and legal growth. In point of fact, however, English law at that time came deeply and beneficially under the influence of Norman ideas and practices especially in the realm of procedure (Lewin 1971, 24).

Though certain reforms encountered some form of resistance to change from some traditional systems, this is the principle of loss and gain that matters a lot in translation. As the sermon by Jesus goes, “unless a grain of wheat falls into the earth and dies, it remains just a single grain; but if it dies, it bears much fruit”². Thus, when referring to the Australian indigenous law, McRae, Nettheim and Beacro (1997, 76) argues:

Indigenous legal systems cannot be infinitely adaptable, infinitely resilient, infinitely indestructible! To date, survival and development have continued with little support from the Australian legal system, indeed despite its encroachments. Indigenous laws have been forced to change, not on their own terms, but in response to the forces of the white invasion.

In some countries, these customary laws simply faded away and did not bring any fruit due to lack of recorded sources that could be used by the new generations. The main problem for this is that, as previously noted, all these systems mostly relied on the oral tradition which exposed them to the high risk of lack of people who were conversant with the system. In this regard, Muquthu quoted by Koyana and Bekker (1998, 249) comments on the case of the Central and Local Courts in Lesotho:

[T]hirty years ago the system worked well because virtually every man knew African custom. Today when everything has to be learned at a school, the system no more works well. Government at one time was phasing out the courts because all magistrates know Lesotho custom as their local Basotho.

In contrast with Lesotho’s situation, Tanzania was lucky to find the *Wazee* (elders) who could remember how the system worked, and assisted throughout the codification of all sectors of its customary law:

Chaque coutume juridique tanzanienne qui se rapporte à la propriété, au mariage, à la succession, est répertoriée par un agent du gouvernement aidé par les assemblées de wazee. Griots et anciens constituent à ce niveau 'la preuve' de la coutume (Verdict 1979, 113)

[Each Tanzanian judicial custom relating to property, marriage and succession was listed by a public servant with the help of the assemblies of Wazee. Griots and elders constitute to this effect the real proof of the custom].

Codification was one way of preserving customary laws. As McRae, Nettheim and Beacro (1997, 77) note, “an important survival strategy for indigenous law has been its capacity to accommodate non-indigenous values, while at the same time upholding underlying traditional values. For example, as McRae, Nettheim and Beacro (1997, 77) go on to argue, *Warlpiri* laws from the Australian indigenous law, “requiring young girls to marry older men have been modified in many communities, in the face of missionary opposition and threats of legal intervention, but the basic kinship rules continue to be enforced”. In addition, “traditional *Yolngu* sanctions such as spearing, which may attract assault or homicide charges, have been replaced by alternative sanctions such as compulsory community work”. This is exactly similar to the TIG³ penalty arrangements, which were imposed to genocide convicts in Rwanda. Customary laws did not face a similar degree of foreign imposition all over the world. In some parts they were completely suppressed and replaced by the coloniser's legal system as demonstrated in the case of Australia noted by Jackson cited by McRae, , Nettheim and Beacro (1997, 344):

[N]either the British nor colonial administrations in Australia made any provision for preserving or reinforcing indigenous law by according it recognition and status as an autonomous system. On the contrary, the systematic and often violent suppression of indigenous legal cultures and processes of justice was a core feature of the establishment of British colonies in countries like Australia and New Zealand.

In the view of McRae, Nettheim and Beacro (1997, 344), this attitude is in stark contrast with other British colonies in Africa and Asia where indigenous systems of law were given at least some degree of formal recognition through the establishment of local courts run by local people applying their traditional laws. According to them, there has now been some recognition of indigenous laws and cultural values. Nonetheless, this recognition remained piecemeal, virtually unsupported by legislative guidelines, and this was observed to a limited extent to ensure that the customary laws fit into the framework of the imposed coloniser's criminal justice system.

1.3. Judicial Process in Customary Courts

The process in customary courts is in many ways different from the modern legal process that we are used to. As earlier hinted, the law was

administered by local community members who were not trained as lawyers. The only skill required was the ability to understand and handle cases on the basis of their experience and wisdom. There was no established court, and an informal court could be improvised whenever a contentious case arose. They did not have any fixed jurisdiction in terms of space until such a time when it was influenced by the Western legal system in the process of codifying it in some parts of Africa. As provided for in the South African Black Administration Act No. 38 of 1927, “no chief or headman may hear cases outside his area of jurisdiction as set out in the letter of conferment of civil (and criminal) jurisdiction. The defendants should be resident in their area of jurisdiction” (Koyana and Bekker 1998, 4). However, despite the changes that the South African customary law underwent, some other more traditional procedural aspects persisted. As Koyana and Bekker (*ibid.*) note, some of the traditional South African recorded “laws did not clearly provide for some procedures of how they would proceed if the plaintiff or the defendants are absent”. Koyana and Bekker (1998, 9) provide an explanation for this:

In a tribal situation, all the people were permanently resident in the tribal area and there were no industrial areas to which men could go and work for periods of six months or more. The farthest one could go was to a medicine man or to relatives and it would not normally happen that a man would be in default at the hearing of his case.

This was the same case in the traditional Rwandan environment where people could only move to visit their relatives to get supplies of food from different villages, go with their cattle in times of drought, etc. but those who stayed home knew where they were and they could easily be traced whenever they were needed. Thus, it could hardly be possible to fail to attend one’s case hearing in a *Gacaca* court. Another procedural element that complicated the recording process of these customary laws in some countries was the use of advocates and attorneys. The traditional system did not have any resort to legal defence. Any wrongdoer had to appear and defend his case except children who could be represented by their parents. However, when the traditional South African law was recorded, the defence of cases by attorneys was introduced. This aspect of defence is pinpointed by Lewin (1971, 19):

[T]he largest majority of cases in the Native Commissioners’ Courts are conducted by attorneys on both sides, and in the Native Appeal Court, it is rare for a litigant to argue his own case. Though attorneys are very expensive, the reform of the South African Native law system with the regulations framed under the enabling Act did anticipate the employment of attorneys. According to Lewin (*ibid.*), these regulations “lay down a comparatively low scale of costs that attorneys may charge the losing or opposite party to a suit”. To limit the cost incurred in the defence, the use of attorneys and advocates was prohibited at the level of the Chiefs’ Courts by the Black Administration Act No. 38 of 1927, Section 5. Similar

stronger reasons that prompted the reformers of the law to dodge that legal defence are put forward by Khumalo cited by Koyana and Bekker (1998, 11): “a chief is not a trained judicial officer, [...] most chiefs have no education, and [...] the very idea of legal representation is unknown in the customary law courts [...] appearance of legal practitioners would make costs in a chief's courts unreasonably high”. However, to be more objective, we should not look at only the merits of the African customary system. As noted from Gluckman (1969, 22), like other customary laws in other continents, African customary legal systems have been criticised for a number of drawbacks that have, to some extent, attracted many researchers' attention:

- simplicity and lack of formality;
- reliance on ‘irrational’ modes of proof and decision;
- the fact that the parties (and often the judges too) are normally involved in complex or multiplex relations outside the court-room, relations which existed before and continue after the actual appearance in court, and which largely determine the form that a judicial hearing takes;
- a commonsense approach as opposed to a legalistic approach to problem-solving;
- the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and

the role of religious and ritual beliefs and practices in determining legal responsibility. Though the European legal system, especially in its inferior courts may have some conciliatory functions, especially in civil matters, we have to acknowledge some merits in the procedure of customary law: prevalence of community justice to uphold unity and reconciliation. On top of that, as earlier noted for some cases like that of Rwanda's *Gacaca*, traditional legal systems have been found even more rational in handling cases than the contemporary laws. With reference to the Kiambu District in Kenya, Lambert quoted by Gluckman (1969, 144) writes: “The judicial system of the European culture involves justice by decree and the granting of exclusive rights to an individual; the African system involves justice by agreement and maintenance of the social equilibrium”.

1.4. Competence of Customary Law and Punishments

In every society, the law has two main functions: preservation of individual freedom and protection of private property. Though this functional principle has been the same for all bodies of the customary law before and even after their codification and reform, the introduction of the legal system of their colonial masters significantly undermined their competence. For instance, after their reform, the South African customary courts had the competence to try any offences at common law or under customary law

with the specific exclusion of all statutory offences as well as those listed by Koyana and Bekker (1998, 17–18) from the Third Schedule to the Act:

[T]reason, *crimen laesae majistratis*, public violence, sedition, murder, culpable homicide, rape, robbery, assault with intent to do grievous bodily harm, assault with intent to commit murder, rape or robbery, indecent assault, arson, bigamy, *crimen injuria*, abortion, abduction, sodomy, bestiality, bribery, fraud, forgery, perjury, incest, obstructing the course of justice, any conspiracy, incitement or attempt to commit any of the above mentioned offences.

In Rwanda, even up to the very recent past, most of these crimes did not exist. Therefore, it is difficult to find their ready equivalents in Kinyarwanda. In the same vein, in Lesotho, Koyana and Bekker (1998, 241) note that the local customary courts had the competence to try very minor offences: minor assaults, use of abusive language, violating soil erosion regulations, trespassing in reserved pastures, failure to obey Chiefs orders and minor cases of malicious damage to property. Appeals from the local court were forwarded to the central court that handled serious cases of assault.

Regarding punishments, Koyana and Bekker (1998, 23) list a number of sentences that a native court in South Africa could be allowed to meet out punishment depending on the type of offences:

- (a) a fine not exceeding two hundred Rand or two heads of large stock or ten heads of small stock;
- (b) corporal punishment imposed by whipping with a cane only and only in the case of unmarried males below the apparent age of thirty years and the number of strokes shall not exceed seven strokes;
- (c) Compulsory labour performed periodically or continuously for a period not exceeding one hundred –and – eight hours at the place designated by the court and under the control of the tribal authority or its delegate.

However, to limit competence of the tribal court, Koyana and Bekker (1998, 23) point out that in exercising its jurisdiction, the court was not allowed to impose any sentence involving death, mutilation, grievous bodily harm or imprisonment. In this respect, all forms of sentences of corporal punishment were later abolished.

The same situation happened in Australia for, according to McRae, Nettheim and Beacro (1997, 76), the modern Australian legal system had an impact upon indigenous laws in a variety of ways: it prohibited many indigenous sanctions, and required wrongdoers to face trial instead of indigenous legal procedures. Even land rights and cultural heritage legislation interacted with indigenous laws in ways unanticipated by the white lawmakers.

The imposition of an alien criminal justice system in Australia resulted into a cultural shock, which awfully affected the Australian indigenous people:

Initially, indigenous people were punished sometimes executed, for acts such as traditional spearing carried out in accordance with their own laws, and for defending their lands against British. Today, despite some reform measures, the criminal justice system remains singularly unsuccessful in bridging the cultural gap. Differences in language communication and culture, wealth and status still ensure that the criminal justice remains to indigenous people an alien and oppressive institution, which systematically works to their disadvantage" (McRae, Nettheim and Beacro 1997, 343).

1.5. African Customary Law versus the Colonial Legal System: Suppression or Preservation?

With the exception of a very limited number of countries such as Egypt and Ethiopia, most African countries did not know any writing system before the arrival of the Whites during the colonial era. According to Lewin (1971, 104), "there were consequently no records whatever of [Africans'] customary law". Worse still, when the colonialists reached Africa, they introduced their own laws and did not immediately recognise and record African customary laws. In the few places where this happened like in South Africa, as Lewin (*ibid.*) acknowledges, it was done very slowly and even too late. This inaction is much more remarkable in British West and East Africa where, according to Lewin, almost "nothing has been attempted and the literature on Native law is of the most meagre kind". In some other countries, the colonisers even fought to destroy indigenous cultures, and therefore totally replaced the indigenous system with their own as shown in the personal account by Sir T. Morrisson, a former Head of District in Kenya:

Je me suis rapidement confronté à de graves questions de politiques, par les questions qui touchent au fond de l'administration coloniale. Devions-nous supprimer les coutumes indigènes, dont certaines sont contraires à notre éthique occidentale? ... Le missionnaire répondit certes à cette question sans difficulté. Ce sont selon lui des coutumes païennes, et son devoir est de les détruire pour les remplacer par une loi supérieure (Olawale 1961, 38).

[I was confronted with some very serious questions of politics, questions that touch on the foundations of the colonial administration. Should we suppress indigenous cultures, some of which are in contrast with our Western ethics? ... The missionary certainly responded to this question with ease. In his view, these were pagan cultures, and his duty was to destroy them and replace them with a superior law].

This is realisation of the revelation made by Rabelais very long ago in 1546 about the colonisers' main objectives as quoted by Verdictict (1979, 114): "*L'on ne retient pas les pays nouvellement conquis ni par les pillages, ni par les corvées, ni par la contrainte, ni par l'exploitation mais en leur donnant des lois et des édits, en propageant des religions, en rendant la*

justice” [Newly conquered countries are retained by means of neither lootings, nor corvées, nor constraints, nor exploitation but by giving them laws and edicts, spreading religions and making justice]. To shed more light on this, Verdickt (*ibid.*) identifies different types of colonisations that existed in Africa, of which modern law was their common denominator: “*les puissances européennes entendaient doter les possessions coloniales d’un droit moderne, mieux adapté à la réalisation de la mise en valeur des territoires coloniaux*” [European powers intended to provide their colonial possessions with a modern law, better adapted to the realisation of the colonial territories development]. In the same perspective, defenders of Christianity who could not distinguish law, religion and morality, went even far to qualify African customary laws as primitive, and thus inferior to their own as implied in Ruhashyankiko’s statement below:

Mêlant le droit, la religion et la morale, les défenseurs de la religion chrétienne véhiculent de la civilisation occidentale. On estime que les coutumes indigènes étaient païennes et donc à combattre, à bannir, à extirper au nom de la civilisation et la culture occidentale jugées supérieures et universelles (Ruhashyankiko 1977, 52).

[Mixing law, religion and morality, the defenders of the Christian religion spread Western civilisation. Indigenous customs were said to be heathen, and therefore they had to be fought, banished and eradicated in the name of Western civilisation and culture which were thought to be superior and universal].

As in most parts of the world subjected to colonisation, the European law was the backbone of different types of current laws used in African countries, and all these laws were established on the eve of independence. According to Lewin (1971, 105), this European system supplied the law of crime, of commerce, of property, and of procedure, as these were branches of law in which native custom could not provide rules since they reflected phenomena unknown in native life. In many countries such as South Africa, Nigeria, Ghana and Gambia, customary laws were preserved but only applied to natives. In all these countries, relevant ordinances were promulgated to ensure their observance as expressed in the following example:

- (i) Nothing in this ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit of any native law or custom existing in the Gambia, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication which any law, for the time being in force.
- (ii) Such laws and customs shall be deemed applicable in the causes and matters where the parties thereto are natives, and also in causes and matters between natives and non-natives where it may appear to the Court

that substantial injustice would be done to either party a strict adherence to the rules of English law (Allot 1962, 3).

In Kenya, the applicability of the native law was almost the same as in other countries that were colonised by the British as indicated in Customary Law Order of 1925 Art. 7:

In all cases, civil and criminal, to which natives are parties, every court

- a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with Order or Council, or any regulation or rules made under any order in Council or Ordinance; and
- b) shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and any undue delay (Allot 1962, 25).

However, the Islamic law, being one category of customary law, resisted the advent of the colonial legal system and in some countries it was preserved officially. This is the case of Gambia where the laws “include provisions for the application of the Sharia law. The earliest of these is the Mohammedan Law Recognition Ordinance, 1905, incorporated in cap. 31 of the laws of the Gambia 1955” (Allot 1962, 3). Similarly, according to Allot (1962, 25), the principal application of the Islamic law in Kenya is “under the Mohammedan Marriage, Divorce and Succession Ordinance Cap. 148, S.3 (2), which gives the Supreme Court jurisdiction in connection with all matrimonial cases arising out of Mohammedan Marriage”. As a matter of fact, the application of the Sharia law was almost the same in all other British colonies. In South Africa, the native Blacks had their own laws which were not coded. According to Lewin (1971, 1), the first attempt to undertake the task of reducing Native Law to writing for the information and guidance of all concerned with administration of justice was the “Native Law Maclean’s Compendium of Kafir Laws and Customs of 1858”. Later, laws from different South African tribes were produced into codes and coding of these laws became imperative in 1933. The main reason was their preservation for, according to Lewin (1971, 4), “the old Chiefs, who had wide knowledge of the subjects (knowledge sometimes misapplied), had gone and very few remained of their advisers who were also experts in the subject”. In some territories like Transkei and Natal, there were Native Courts of Appeal and Native High Courts. Justice in these courts was administered by assessors who were usually men of distinction in the tribe.

According to Gluckman (1969, 32), codification of the civil-law tradition in African countries went farther in the making of a new, unified and systematic law. In some states (such as Madagascar), codification was preceded by a long and searching investigation of the local customary laws; in others (such as Ivory Coast and Ethiopia) codification went ahead

without comprehensive prior study of local customary laws which were diverse in nature.

Allot (1962, 15) captures that, in Gambia by Section 3 of the NCO (Native Court Ordinance), Cap.8, Native Courts were established in each district of the former Protectorate and recognised for the administration of justice. These were called the Native Appeal Courts and Courts of the Native Chiefs. According to this Ordinance, these courts were led by the Paramount Chief and one or more of his representatives. This was the same in Ghana for, as noted by Allot (1962, 25), until recently, the court members were almost exclusively Chiefs and elders. In the case of Rwanda, this was replicated in the *inyangamugayo* where men of integrity and wisdom settled disputes.

As noted earlier, Lesotho also had its own customary law with structured courts. According to Koyana and Bekker (1998, 241), Lesotho's lowest customary court was the local court and it had – and– still has the original jurisdiction only. In Rwanda, the 1962 Constitution promulgated just after independence provided for codification of Rwandan customary law and its harmonisation in article 19. However, Verdickt (1979, 113) admits that this idea never materialised:

L'article 109 de la constitution rwandaise du 24 novembre 1962 prévoit une loi organique pour déterminer la procédure selon laquelle les coutumes-lois sont codifiées et mises en harmonie avec les principes fondamentaux de la constitution. Ce texte est resté lettre morte. [Article 109 of the Rwandan Constitution of November 24, 1962 provides for an organic law determining the procedure to follow in the codification of customary laws and their harmonisation with the fundamental principles of the constitution. However, this organic law was never implemented].

The fact that this codification did not take place prevented *Gacaca* from resisting the influence of the legal system from colonial masters whose law was written and relatively well-structured.

¹ All translations unless otherwise indicated are my own or wording to that effect.

² This is quoted from the Holy Bible, John 12: 20–33.

³ This was referred to in French as *Travaux d'Intérêt Général*, which can be backtranslated as 'works for public interest' that serve as one of the penalties provided for in the *Gacaca* organic law, article 73 §2 and 3.

CHAPTER TWO

Pointers to the *Gacaca* Source Legal System

2.1. Background to the Rwandan Legal System

Verdict (1979, 117) views the Rwandan customary law as a set of judicial rules of a social group known as Banyarwanda: “*L’on entend par droit coutumier du Rwanda, l’ensemble des règles juridiques du groupe social des Banyarwanda dans sa diversité ethnique traditionnelle. Ce groupe social connaissait et connaît plusieurs structures spécifiques formant un système*” [Rwandan customary law refers to a set of judicial rules of a social group of Banyarwanda with its traditional ethnic diversity. This group is composed of several specific structures that form a system]. According to Vanhove (1941), the Rwandan customary law consisted of regulations on succession, marriage, obligations and contracts. To these, we can add the land law, which was, and still is, one of the most important areas of the Rwandan economy. In accordance with these laws, the King was the supreme authority of the country, and there were regulations determining succession to the throne. It was a monarchical regime, and according to the regulations, the power was transmitted from father to son. In his administration, the king was helped by his mother *umugabekazi* who had a very big say in her son’s decisions. This proves how, since times immemorial in Rwanda, women have preserved a very fundamental role to play in the top management of the country. At the lower level, though women were not appointed at regional or village levels as chiefs, they kept their invisible hand to influence their husband’s way of performing their duties of ruling even up to the household level as expressed in the very old Kinyarwanda saying *ukurusha umugore akurusha urugo*. This means whoever defeats you in having a good wife, defeats you in having a richer household. This implies that men were responsible for ruling duties while women indirectly occupied managerial and advisory positions at all administrative structures of the country. Rwanda’s customary law was not written, and according to this law, most of the powers were vested in the *Umwami*; the king and the supreme authority of the entire country. The laws were promulgated by the *Umwami* and enforced to the whole population up to the village level. Ruhashyankiko (1977, 57) describes the process of the Rwandan customary law making and implementation as follows:

Le pouvoir législatif du monarque traditionnel du Rwanda s’exerçait par voie de décrets. Ceux-ci étaient promulgués publiquement et solennellement. On les proclamait dans le pays avec batterie de Tambour Rucabagome. Les décrets étaient transmis de génération en génération par voie de tradition orale.

[The legislative power of Rwanda’s monarch was exercised by means of decrees. The latter were publicly and solemnly promulgated. They were

proclaimed in the country by the drumming of the Rucabagome drum¹. The decrees were transmitted from generation to generation by means of oral tradition].

2.2. Main Features and Sources of the Rwandan Law

The Rwandan law is characterised by a number of socio-cultural aspects which include solid social cohesion among the different groups living in the Rwandan society, high respect and esteem for elders and protection of the most vulnerable persons:

La société rwandaise se caractérise par ses structures sociales et administratives dont la solidarité était indéniable, structure de castes-structure de clientèle, par sa structure politique et par sa structure familiale. [...]Le fonctionnement de ces structures devait mettre en jeu tout un réseau de rapports multiples et variés qui ont dû être l'objet d'une réglementation stricte (Ruhashyankiko 1977, 50).

[The Rwandan society is characterised by its administrative and social structures whose solidarity was undeniable, by its caste structure, its political and family structure. [...] The functioning of these structures had to involve an entire network of multiple and varied relationships which had to be subjected to strict regulations].

In addition, like other African customary laws, the Rwandan customary law was community-based and the individual had very limited space to influence the course of the law. Everything had to be discussed and settled in the community. This is due to the fact that, as Ruhashyankiko (1977, 60) repeats, the organisation of the Rwandan traditional society was based on the caste system:

La société rwandaise est une société de caste. Chaque caste a ses droits et ses devoirs. Et à l'intérieur de chaque caste il existe de très grandes différences. L'individu est subordonné à la communauté dont il est élément anonyme et qu'il doit servir fidèlement.

[The Rwandan society is a caste-based society. Each caste has its rights and duties. There are very significant differences within each caste. The individual depends on the community of which he is an anonymous element that he must faithfully serve].

This mere description of the Rwandan society reflects the intimate and strong ties that existed between its members. Contrary to modern law principles, as (Ruhashyankiko 1977, 73) points out, there were shared responsibilities within members of the community for any committed crime:

Il y a des liens intimes de fraternité et de consanguinité qui unissent tous les membres du groupe clanique. On reconnaît la responsabilité collective. En cas de meurtre, de vol commis par un membre de groupe, tous les autres sont concernés et responsables. La notion de responsabilité personnelle si chère dans notre monde en matière pénale s'estompe.

[There are intimate fraternity and consanguinity relationships which unite members of the clan. Responsibility is collectively shared. In case of murder or theft committed by a member of the group, all other members are concerned and responsible. The notion of individual responsibility characterising our modern world becomes blurred].

Another important aspect is that the Rwandan customary law was unitary, and according to (Ruhashyankiko 1977, 61), this is due to a number of reasons, among others, one language for the entire Rwandan community:

Le droit coutumier rwandais connaît une véritable unité. Grâce à l'unité linguistique, aux mêmes données d'une longue histoire, aux mêmes manières de concevoir la vie. Il existe des différences des nuances suivant les régions. Mais ce sont des différences de détail. L'essentiel reste identique.

[The Rwandan customary law experiences real unity. This is a result of its linguistic unity, long historical past, the same ways of perceiving life. There are some differences of nuance depending on regions. But these are minor differences. The gist remains intact].

As a result of the use of one language across the entire country, even the terms used for different legal provisions were the same. The terms used for one offence in one region would be the same in any other. As an example, the Rwandan legal system had different terms to refer to stealing offences as described by Vanhove (1941, 107) and all these were used throughout the country with exactly the same concepts (Table 2.1).

Table 2.1. Kinyarwanda terms used to refer to stealing offences

Kinyarwanda	French	English [My translation]
<i>Ubujura</i>	<i>Vol</i>	Stealing
<i>Umujura</i>	<i>Voleur</i>	Thief
<i>Umushimusi</i>	<i>voleur de bétail</i>	cattle thief
<i>Igisambo</i>	<i>qui dérobe des vivres, des instruments, etc.</i>	who steals provisions, instruments, etc.

Though it does not seem easy to determine the scope of customary law, of course with some reserve, Ruhashyankiko (1977, 59) states that Rwandan customary law contained all sectors of the law:

La distinction classique entre droit public et droit privé existe en droit coutumier rwandais. Nous apercevons des règles précises relatives à l'organisation de l'Etat et sa structure, à la réglementation des rapports de nature variée entre différents pouvoirs publics ainsi qu'au statut de ceux-ci. Nous y trouvons des prescriptions minutieuses concernant l'organisation et le fonctionnement des services administratifs, la formation des armées sociales, la création et la composition des armées bovines, la fiscalité,

l'organisation judiciaire et procédure, la détermination des infractions et des peines applicables.

[The classical distinction between public and private laws also exists in the Rwandan customary law. We have precise rules relating to the organisation of the State and its structure, regulation of varied relationships between different public powers and their status. There are meticulous regulations regarding the organisation and functioning of administrative services, the formation of social armies, the creation and constitution of cattle herds, tax, procedure and judicial organisation, determination of offences and applicable penalties].

In fact, all these aspects show that the Rwandan customary law, though not clearly defined in some sectors due to lack of codification, contained a twofold division similar to that of the classical legal system: private and public law. This customary system had also some subdivisions that are well known in modern law, such as criminal law, civil law, administrative law and tax law. The Rwandan customary law governed its well-determined social, political and economic structures. Its caste-based social structure developed into the structures of social classes, and family structures related to family kinship and lineage. Like some other countries, Rwanda underwent evolution at social, cultural, political, technological and economic levels which led to structural changes in its different aspects of life. In the economic aspect, Ruhashyankiko (1977, 72) provides an example: *“L'économie du marché s'est substituée à l'économie de subsistance comme dans la société traditionnelle. Des rapports nouveaux se sont établis dans le monde des affaires beaucoup plus complexes”* [Market economy replaced subsistence economy that characterised the traditional society. New relationships were established in a more complex business world]. When the European colonisers arrived, they gradually influenced the Rwandan judicial system; they set up some other laws to complement the existing customary law. *“[D]epuis l'indépendance, outre les dispositions de la législation coloniale non abrogée, nous avons des dispositions ayant valeur de loi: loi, ordonnance-loi, décrets-loi”* (Ruhashyankiko 1977, 57). [Since independence, apart from the provisions of colonial legislation which were not abrogated, we have provisions that have the force of law: law, order-law, and decree-law]. Ruhashyankiko (1977, 57) describes four main sources of the modern Rwandan law of which custom stands out conspicuously:

- (1) **The Law:** This was a provision designed in a general impersonal and objective manner and enacted by the competent authorities. In this domain, Rwanda experienced a dual system up to independence in 1962: laws, decrees and ordinances enacted by the colonial legislator on the one hand, and other laws emanating from real legislative power held by customary authorities before the arrival of the coloniser, on the other. Today, laws and decrees are respectively enacted by the legislative and the executive powers.

- (2) **Regulations:** these were general provisions drawn up by the executive within its limits. Before independence, they included orders, ordinances and regulations from the colonial power. At that time, there was no clear-cut distinction between the Legislative and the Executive. The King could intervene in both powers. After independence, different constitutions of the country that followed each other provided for the 'separation of powers' between the Executive, Legislative and Judiciary;
- (3) **Judicial Precedent:** these were court decisions, which, though not constituting enforcement of the law due to their argumentation and integration in the system remained an important source of inspiration for the legal decision machinery.
- (4) **Custom:** refers to the rules of social conduct that have been repeated over time and ended up becoming binding for all members of a given group or society. According to Ruhashyankiko (1977, 58), a custom expresses tacit will of only the persons it concerns, and constitutes an important force of the law: "*Elle est censée exprimer la volonté tacite de tous ceux qui sont concernés. Au Rwanda la coutume existe et doit être considérée comme une force importante de droit*".

2.3. Gacaca Courts

Gacaca was defined by Muberanziza (1998, 42) as:

[...] *urukiko rwo mu muryango cyangwa se rw'abaturanyi bigiragamo ibibazo bivutse hagati y'abantu aba n'aba maze bigakemurwa mu bwumvikane ntawe uhutajwe akaba ari na byo byatumaga ubwizerane n'ubusabane byarakomezaga kuranga imiryango.*

[*Gacaca* is a family tribunal or of neighbours in which disputes were peacefully settled. It was a mechanism of restoring mutual trust and understanding between families].

As earlier noted, like any other customary system, the traditional *Gacaca* courts were not composed of the same formally structured courts as those emanating from statute law systems. They were simply made of improvised groups of eminent persons purposively selected to settle a problem that the village as whole or an individual had encountered. The judges accredited to *Gacaca* were composed of persons referred to as *inyangamugayo*, which literally means 'people who hate disgrace'. The main objective of this system was to maintain law and order and social cohesion in the Rwandan society. This is the same aim that Rwandans had in mind when the system was revived to be adapted to the new context and challenges of the 1994 genocide against the Tutsi. De Beer (1999, 7) confirms this role of *Gacaca* courts: "[...] *être le socle sur lequel recréer le lien social et faire en sorte que le passé ne soit pas un obstacle pour l'avenir*" [To be the base on which the social fabric can be re-established and ensure that the past does not constitute an obstacle for the future]. This was to be achieved by

eradicating the culture of impunity which required that justice be done to victims by judging genocide perpetrators and holding individuals accountable for their wrong deeds. In the *Gacaca* process, if the plaintiff was not satisfied with the decision of the bench of *inyangamugayo*, who are eminent wise persons from his village, he could appeal against the decision in higher structures, namely chiefs. Only very complicated cases could reach the king. This was linked to the Kinyarwanda saying *urujya kujya ibwami rubanza mu bagabo*, which means: for any case to reach the king, it should first be heard by an assembly of eminent men. In the Rwandan culture, the term *umugabo* (the singular form of *abagabo* = men) primarily means 'a man'. In other instances, it connotes either a strong, powerful, wise or kind person with integrity. However, though Rwanda counts among many societies that were governed in a patriarchal organisation for a long time, it is necessary to note that, in its connotative usage, the term *umugabo* does not have anything to do with gender, and it is not limited to a man only. Since long, even Rwandan women fulfilling the qualities of wisdom, kindness, integrity, and the like, have always been referred to in the same way, and could sit as judges in *Gacaca* courts. In all matters, the King remained the supreme chief of justice and his decision was final. In fact, the traditional *Gacaca* system seems to be more conciliation-oriented than the statute law system imported from the West. Its structure followed very limited levels (i.e. the community, chiefs and the King), and this is different from the modern court structure. In this regard, Ruhashyankiko (1977, 170) divided the procedure of the Rwandan customary law into two main phases: "*Une phase préliminaire de réconciliation, une phase judiciaire de règlement du différend*" [A preliminary phase of reconciliation and a judiciary phase that consists in dispute handling]. According to him, the preliminary phase is the most important one in this procedure, for it favours reconciliation. This is the system that was adopted to deal with the crimes of the 1994 genocide; some modifications were indeed made to adapt, by and large, to the socio-cultural context and challenges after the genocide and the modern domestic and international law standards. The Organic Law of 2004 setting up "*Gacaca* Jurisdictions" that was produced to meet the challenges of the 1994 genocide against the Tutsi is the sole law that is referred to in this book as the modern *Gacaca* law. Considering the way it is presented, follows the classical legal format and structure that is arranged according to titles, chapters, and sections as presented in Box 2.1.

Box 2.1. Modern *Gacaca* law format and structure

Title I: Offences under the Applicability of This Organic Law

Title II: Setting up, Organisation and Competence of *Gacaca* Courts and Relationship with Other Institutions

Chapter I: Setting up and Organizing *Gacaca* Courts

Section One: Setting up and Jurisdiction

Section Two: Organs of *Gacaca* Courts

Section Three: Members of the Organs for *Gacaca* Courts

Section Four: Functioning of the Organs of *Gacaca* Courts

Section Five: The Duties of *Gacaca* Courts

Chapter II: The Competence of *Gacaca* Courts

Section One: *Rationae materiae*

Section Two: *Rationae loci*

Chapter III: Relationship between *Gacaca* courts and other institutions

Section One: Relation between the Public Prosecution and *Gacaca* Courts

Section Two: Relationship between Administrative Organs and *Gacaca* Courts

Section Three: Relationship between the *Gacaca* Courts and the National Service in Charge of the Follow up, Supervision and Coordination of Activities of *Gacaca* Courts

Title III: Prosecution of Offences and Proceedings

Chapter I: Prosecuted Persons

Chapter II: Procedure of Confessions, Guilt Plea, Repentance and Apologies

Section One: Acceptance of Confessions, Repentance and Apologies and Conditions Required

Section Two: Procedure of Confessions, Guilt Plea, Repentance and Apologies

Chapter III: Hearing and Judgement

Section One: Hearing and Judgement before *Gacaca* Courts of the Sector and *Gacaca* Courts of Appeal

Section Two: Hearing and Judgement before the *Gacaca* Courts of the Cell

Section Three: Maintenance of Law and Order During the Hearings

Chapter IV: Penalties

Chapter V: Summons of Defendants and Notifications of Judgements

Chapter VI: Means of Appeal

Section One: Objection

Section Two: Appeal

Section Three: Review of Judgement

Chapter VII: Compensation of Damaged Property and Other Forms

Title IV: Miscellaneous, Transitional and Final Provisions

As in other legal documents, the smallest subdivision is article, from which I extracted different provisions to analyse and translate. Throughout its

body, the *Gacaca* law refers to the main legal instruments used in the country: the Constitution of the Republic of Rwanda of June 4, 2003; Decree-law No. 09/80 of July 7, 1980 establishing the Code of the Judicial Organisation and Competence; Decree-law No. 21/77 of August 18, 1977 instituting the Penal Code; and the Law of February 23, 1963 on the Code of Criminal Procedure, etc. The *Gacaca* law also refers to different international conventions, such as the International Convention of December 9, 1948 relating to repression and punishment of the crime of genocide and the convention of November 26, 1968 on imprescriptibility of war crimes and crimes against humanity. In addition to this, the law draws significantly from the Rwandan Traditional Legal System, especially its participatory approach to achieve optimal involvement of members of the community in which the crimes were committed. In its review, I find that the *Gacaca* law heavily uses statutory language which is specifically of normative nature in order to direct people's behaviour in the Rwandan society as in the following expressions: *agomba* (art.9) [a strong obligation/ (he must)], *ntiyemerewe* (art. 10) [a prohibition/ (he is not allowed)] and *ifite inshingano* (art.12) [it is entrusted with the duties]. The language used is also performative. This is shown by the use of some verbs whose utterance implies an action. The use of these verbs appears in the legislative stipulations on: prosecution (Title III), procedures of confessions, pleas of guilty/not guilty, repentance and apologies (Title III, Chapter II), hearing, judgement and appeal (Title III, Chapter III) sentences (Title III, Chapter IV), etc. This performative function is expressed by means of some linguistic markers such as *gusobanura* [to explain], *kuvuga* [to express], *kwemeza* [to confirm], *kubaza* [to ask or to question] which are normally translated into English with the extensive use of the modals 'may' and 'shall'. In this context, a number of performative verbs such as 'declare', 'announce', 'promise', 'undertake', 'enact', 'confer' and 'amend' as described by Cao (2007, 21) can also be used. In addition, the *Gacaca* law contains a significant number of names designing Rwandan local government entities or institutions, such as *Intara* [Province], *Umujyi wa Kigali* [Kigali Municipality], *Akarere* [district], *Umurenge* [sector], *Akagari* [cell] and *Komisiyo y'igihugu y'amatora* [National Electoral Commission]. More importantly, it draws significantly from the Rwandan culture. This is justified by the frequent use of typically Rwandan culture-bound concepts, such as *inyangamugayo*, *inteko* and *Gacaca*. It also depicts some Rwandan family relationships, such as *sekuru* [grandfather], *nyirakuru* [grandmother], *abavandimwe* [relatives], *abuzukuru* [grandchildren], *se wabo* [paternal uncle], *nyina wabo* [maternal aunt], *ababyara* [cousins], *bene se wabo* [paternal cousins] and *bene nyina wabo* [maternal cousins] (art.10). Another interesting aspect of the law under study is its use of some Kinyarwanda neologies newly introduced to match concepts that did not exist before the genocide: *itsembabwoko n'itsembatsemba*² [genocide] (preamble), *ibyaha byibasiye inyokomuntu* [crimes against humanity] [preamble], *Inama Mpuzabikorwa* [coordination committee], *akanama k'ubutegetsi na politiki* [political and administrative

committee] (art. 15), *abatangabuhamy* [witnesses], *inyandikomvugo* [minutes] (art. 60), *igihano nsimburagifungo cy'imirimo ifitiye igihugu akamaro* [works of public interest] (art. 78) and *umuco mbonezabupfura* [morality] (art. 21). As a matter of fact, the *Gacaca* law reflects the language of the Rwandan legal system though it is greatly influenced by modern legal systems of the target legal systems (English and French). The source text that is in Kinyarwanda is made of 31 pages and both English and French versions have 27 pages each. In its review thoroughly and critically scrutinised and analysed each of its title, chapter and section. In order to place the *Gacaca* law in its context, the three documents that supported in its implementation were examined in detail. These are: *Procédure de collecte d'information nécessaire dans les juridictions Gacaca* (2004), *Procédure de jugement dans les juridictions Gacaca* (2005) and *Le processus des juridictions Gacaca: genèse et réalisations* (2008). In the review of all these documents, I identified and underlined different areas that are likely to hinder the translatability and transferability of the *Gacaca* law into English and French legal systems for deeper analysis, taking into account their socio-cultural context.

After aligning these problematic areas with their corresponding translations provided in French and English, I compiled all these aspects and included them in an interview guide. The next step was to submit them to natives of the three systems. In my instructions, I asked the natives to read the text carefully, and underline aspects that they could not easily understand. In most cases, I also asked them to provide a few comments on the reasons why they thought they had failed to understand those aspects. In the same process, I reviewed varied written materials on international criminal law and the convention on the genocide to check some discrepancies with the law under study that could lead to misinterpretations if its socio-cultural context is not appropriately considered.

2.4. Jurisdiction and Court Structure in Rwandan Law

As Ruhashyankiko (1977, 51–52) notes, Rwandan customary and modern laws have always co-existed since the arrival of the colonisers in the early 20th century: “*Le droit coutumier a joué et continue de jouer un très grand rôle dans la société rwandaise. Il a coexisté longtemps avec la loi du colonisateur*” [Rwandan customary law has played a very big role in the Rwandan society. It has for a long time co-existed with the coloniser’s law]. However, Ruhashyankiko (1977, 52) points to the fact that the system imposed by colonisers was not well adapted to the local context: “*Au système coutumier est venu se superposer sans s’y substituer un droit colonial mal adapté et inapproprié*” [An inappropriate and badly adapted colonial law came to be superimposed upon the customary system without taking its place].

As noted earlier, in most parts of Africa, writing was brought by the colonial system. In the case of Rwanda, the first source of the written law was the Ordinance No. 2/5 of June 6, 1917 of the Royal Commissioner on

Ruanda-Urundi Indigenous Courts. These courts were established to give to the Residents the competence to represent their Government by maintaining public order and security and supervising indigenous political and judicial authorities in accordance with indigenous custom and the Royal Commissioner. However, as Kalisa quoted by Ndamage (2003, 13) points out, the indigenous legal system was seriously weakened by the introduction of the colonial judicial system: “*L’ordonnance législative du 28 avril 1917 portant organisation judiciaire vint diminuer sensiblement la compétence des juridictions indigènes en matière répressive en créant des juridictions criminelles pour juger les infractions commises par les indigènes.*” [The legislative ordinance of April 28, 1917 determining judicial organisation noticeably diminish the competence of indigenous courts in their repressive capacity by establishing criminal courts to judge offences committed by the natives].

As a matter of fact, the 1917–1924 period was characterised by the replacement of the traditional administrative system by modern system through the creation of *sous-chefferies* and territories as well as modern tribunals that applied written laws. The *Gacaca* system was in this way abandoned and a new system was put in place. According to Ndamage (2003, 13), in 1925, the Resident and the King came to an agreement, and 15 territorial courts and 1 court of appeal were established. These courts had the competence to handle both civil and criminal matters among Rwandans or Rwandans and other indigenous tribes from neighbouring countries, but later in 1925, the imprisonment sentence, one of the major aspects of the coloniser’s legal system, was removed from the competence of indigenous courts, which remained with powers to handle only civil matters.

In 1934, a new important element was introduced in the Rwandan legal system: a conciliation tribunal was established in Nyanza territory to attempt a friendly agreement before a case was submitted to indigenous courts. The following year, this structure was replicated to other territories. In 1943, Ordinance No. 348 of October 5, 1943 limited Rwandan indigenous courts to three customary courts: the *chefferie*³ court, the territory court and the court of the *Mwami*. Citing *Bulletin Officiel of Ruanda-Urundi*, Kalisa (1986, 11) indicates that the Decree of July 5, 1948 establishing the Judicial Organisation of Ruanda-Urundi respected the co-existence of indigenous courts and those of European nature. This Decree was abrogated by that of February 20, 1962, which established the Code of Judicial Organisation and Competence. Hence, the dualism of indigenous and colonial legal systems which had characterised the Rwandan legal system for almost half a century was replaced by only one — the written law, which is still in use up to today, though with some spatial and temporal adaptations.

Article 99 of the first Constitution of Rwanda of 1962 established a court structure (see Table 2.2.) that resembled that of France’s. From the lowest

to the highest courts, these institutions bore typical French names whose translation into Kinyarwanda generally resorted to the technique of *calque* or coinage.

Table 2. 2. Rwanda's courts structure before 1994

French	Kinyarwanda	English translation and description
<i>Tribunal de canton</i>	<i>Urukiko rwa kanto</i>	Communal Court— this was the lowest instance of legal proceedings and was based at the commune level.
<i>Tribunal de première instance</i>	<i>Urukiko rwa mbere rw'iremezo</i>	Court of First Instance –the second instance of legal proceedings and was based at the <i>prefecture</i> /province level.
<i>Cour d'appel</i>	<i>Urukiko rw'ubujurire</i>	Courts of Appeal—these courts were located in the four main regions of the country (i.e. North, South, East and West).
<i>Cour de cassation</i>	<i>Urukiko rusesa imanza</i>	Court of Cassation— this was the highest court of the country.

What is obvious is that the name *tribunal de conton* is in the same position as *tribunal d'instance* in the French system. The term *tribunal de grande instance* is similar to the former Rwandan *tribunal de première instance* whereas the highest two courts from both systems carried exactly the same names. All of them are rendered using the translational technique of *calque* that consists in transferring literally the source language structure to the target text. To fill the gap that existed in Rwanda's legal system, some coinage also was resorted to in the case of some words such as '*kanto*' for the French word '*canton*' and '*rusesa imanza*' for '*cassation*'. Though English could be used in some circles, especially in the field of business, no attempt had been made to translate these courts into English.

Later, with the Constitution of 2003, which was promulgated in the period after the 1994 genocide, two types of courts were established: ordinary courts and specialised courts. In most cases, the structure of these courts was squared with the new decentralisation policy of 2000 that set up new administrative units from the cell to the province levels, in ascending order of: cell, sector, district, municipality and province. The Rwandan Constitution organises the structure of Rwandan courts from the Court of the District or the Municipality, the Court of the Province or of Kigali City, the High Court of the Republic to the Supreme Court. Since at that time Rwanda was adopting a trilingual policy, all its courts got their names translated into three official languages (i.e. Kinyarwanda, French and English). Later however, following subsequent amendments of the Constitution, another structure was created with a few changes. As indicated in article 143 of the Rwandan Constitution as amended to date, ordinary courts include the Supreme Court, the High Court, Intermediate

Courts as well as Primary Courts. Specialised courts include *Gacaca* courts (which are the subject of this study), military courts, and commercial courts. In this structure, the Supreme Court remains the highest court in the country, whereas the Primary Court is the lowest instance that handles matters at the grassroots level.

¹ This is a compound Kinyarwanda word (*guca*=eradicate + *abagome*= criminals). This name was given to this drum to stress the punitive nature of the law, and its importance in eradicating criminals.

² The term was coined to refer to the genocide, but underwent several changes with *itsembabwoko*, *genocide*, now the officially used term is *jenocide yakorewe abatutsi*, which can be backtranslated as 'genocide committed against Tutsi'.

³ An administrative unit headed by a chief.

CHAPTER THREE

Pointers to the *Gacaca* Target Legal Systems

3.1. French Legal System

The French legal system is divided into two main parts: customary and written law. This system was heavily influenced by the Roman law, as was the case for the majority of other European countries. “Roman Law, as shaped by the civilians, was undoubtedly strong in the *pays de droit écrit*, as the flourishing law schools at Montpellier and Toulouse” (Robinson *et al.* 1994, 113). The Roman law reached France in the Middle Ages after the deposition of the last Roman Emperor: “At the fall of the Western Roman Empire, A.D. 476, what is now France was inhabited by Romanised Celts, or Gallo-Romans, and Germanic tribes, the Franks, Burgundians, and Visigoths. Each group had its own law, with the Gallo-Romans living under Roman law” (David 1972, 1).

The *Lex Romana Visigothorum*, or *Alarician Breviary*,¹ constitutes the principal sources of Roman law in France from its promulgation in 506AD, and remained the main source of information about the Roman law in France from the sixth to the twelfth century. The proof of all this is provided by Robinson *et al.* (1994, 113) in his description of the way in which French lawyers were versed in the science of the Roman law: “Roman terminology concepts did provide a framework within which custom could be supplemented and system imposed. So at that time, French lawyers were trained in law at universities, and they were familiar with the Roman law from which they drew for particular solutions and conclusions.”

3.1.1. Main Features and Sources of the French Law

Like many other legal systems in the world, the French legal system was not originally written. It was primarily a product of customs from different regions and tribes of the country. Later with the influence of Roman and Common law, some collections of customs were reduced to writing by means of oral investigation. This was first done “under the authority of local *seigneurs* (lords), and later under royal ordinance” (Dadomo and Farran 1996, 5). This divided France into two legal areas: the *pays du droit écrit* [country of written law] in the South, where Roman law had the greatest influence and the *pays du droit coutumier* [country of customary law] in the North. The French law originated from almost similar sources like the laws of most of other European countries, especially those that used the civil law. However, due to their historical contact through conquest, and owing to their current membership to the European Union, a significant number of commonalities between the French and English legal systems can be spotted. As detailed by David (1972, 154–194), the French law draws from:

- **Legislation (*la loi*):** This is the most important source of the French written law. This source is much more visible in private and criminal laws.
- **Custom:** The main source of the French Civil Code draws from the areas of marriage, family relations, farming, administration, etc. It helps lawyers using legislation terms to interpret them from the sense that ordinary men give them.
- **Judicial Decisions:** These are the source that helps in the application of pre-existing statutes or custom. In the absence of the applicable statute or custom, decisions can be based on the principles of equity, reason, justice or tradition.
- **Legal Scholarship:** These consist of legal publications that help lawyers to learn and be acquainted with the French legal system. They serve to criticise judicial decisions as well.
- **Super-Eminent Principles:** the role of these is twofold: (1) they help to fill gaps, which exist in legislation in the limited area of the French law; (2) in exceptional circumstances, these principles can help to correct existing legislation

3.1.2. French Law Jurisdiction and Court Structure

The French judicial system is divided into two separate bodies: judiciary (ordinary) law and administrative law². The latter is concerned with litigations involving the public sector and their top jurisdiction is the Council of State. As translated in English (see Table 3.1), French judicial courts range from the lower district court to the court of cassation that is sometimes referred to as France's Supreme Judicial Court.

Table 3.1. French court structure

French court	English translation and description
<i>Tribunal d'Instance</i>	Lower District Court — the first instance of legal proceedings
<i>Tribunal de Grande Instance</i>	Higher District Court – litigants are required by Statute to be represented by a French Attorney
<i>Tribunal de Commerce</i>	Commercial Court— a separate jurisdiction which deals only with matters relating to trade and commerce disputes
<i>Cour d'Appel</i>	Court of Appeal— one in each major administrative region
<i>Cour de Cassation</i>	Court of Cassation— the highest court of the country

All these courts deal with both civil and criminal matters. With the exception of the Supreme Court, which was introduced into Rwanda's court structure a bit before the 2003 judicial reform that was initiated to establish

the current structure of courts, Rwanda had for long kept the structure it had inherited from its Belgian colonial masters whose system resembles that of France. In most cases, when mediating between French, English and Kinyarwanda legal systems, the task becomes very complicated for the translator. The main difficulty that arises in the rendition of the names of these courts into English or Kinyarwanda is that their structures and jurisdictions are different in many ways. This would be much more complicated when the translator attempts to render them into Kinyarwanda after the 2003 judicial reform that produced a mixed system. In this situation, some scholars propose to take into account the differences in court jurisdiction. In this regard, Cao (2007, 64) provides an example from Geeroms (2002) of the terms *cassation* (*cour de cassation*) in the French system, *revision* in the German system (*Bundesgerichtshof*), and ‘appeal’ (or appellant court) in the Common Law system. In the view of Cao (*ibid.*), these terms “should not be translated as equivalent as if they were the same”. His justification is that normally the appellant courts in these systems have “different powers and jurisdictions”.

3.2. The English Legal System

The English legal system is commonly referred to as the Common Law. However, Van Caenegem (1973, 88) views it as a type of law that is “so different from the *jus commune* or common learned law of European universities” and “the oldest national law in Europe”. According to him, the system “prefers precedent as a basis for judgement, and moves empirically from case to case, from one reality to another”. Like most other legal systems, the English legal system is a product of varied national as well as foreign sources. The national ones include custom and equity, whereas the foreign sources are mainly the French and Roman systems.

3.2.1. Main Features of English Law

The system was greatly influenced by other legal systems, namely the Roman, Anglo-Saxon and French systems, which are even reflected in today’s British legal language. According to Alcaraz and Hughes (2002, 5), the English law grew out of a system that evolved in the Middle Ages when Latin, bolstered by the power and prestige of the Roman Church was the *lingua franca* throughout Europe for written texts and intellectual exchanges. Another important reason was that the Roman law was so well written that all jurists strived to model their home systems on it.

Roman law was a coherent written system that, for centuries, had been developing over a wide area of Europe and the force of an institution. It was inevitable, therefore, that some of its precepts and formulations should become enshrined in the texts and the professional speech of English lawgivers who shared a common culture with their colleagues elsewhere (Alcaraz and Hughes 2002, 5).

After the Germanic invasion, a type of legal English was developed from Anglo-Saxon or old English, and according to Altay (2002), there are some

of its remnants, which include words such as “bequeath”, “theft”, “guilt”, “land”, etc. The Roman influence was instead exerted through Christianity and the Latin language:

[A]significant event for the language and law of England was the spread of Christianity in 597, since it promoted writing in Latin. Through the Roman Catholic Church the Latin language once again had a major presence in England. Its influence extended to legal matters, particularly by means of the Canon Law, through which the Church regulated religious matters such as marriage and family (Altay 2002).

As Tiersma cited by Altay (2002) stresses, the use of Latin and French in the English law started after the Duke of Normandy invaded England and claimed the English throne in 1066. In her view, “the main impact of this Norman Conquest on the written legal language was to replace English with Latin”. From 1310, the language of statutes was French, but it was not until two hundred years after the conquest that French became the language of oral pleadings in the royal courts. Tiersma quoted by Altay (*ibid.*) specifies that for the next one or two centuries, French maintained its status as England's premier legal language. Since then, French and Latin dominated the English legal language, especially in its written form as the English system exhibits a preservation of a number of expressions deriving from Latin: ‘client’, ‘admit’, and ‘mediate’, etc. and even some of English writs got Latin names because they were drafted in Latin. As an example, looking into different legal documents, Alcaraz and Hughes (2002, 5) list the following Latin phrases that are commonly found in the English legal discourse (see Table 3.2).

Table 3.2. Examples of Latin words used in English legal discourse

Latin phrase	English	French
<i>Prima facie</i>	at first sight	<i>Légitime</i>
<i>Bona fide</i>	<i>Bona fide</i>	<i>De bonne foi</i>
<i>Res judicata</i>	<i>Res judicata</i>	<i>Affaire jugée</i>

As shown in Table 3.2, except in the first row where the expression ‘at first sight’ can be used in the English plain language, the English legal system keeps the Latin terms *bona fide* and *res judicata* in its everyday legal discourse.

The English legal language was not only influenced by the Roman law. The French system also left its indelible mark in the English legal system to the extent that there are a number of French terms used in English law for which there are no ready English equivalents: ‘accounts payable/receivable’, ‘attorney general’, ‘court martial’, etc. In this regard, the most conspicuous impact of French is the big amount of technical vocabulary deriving from it, including many basic words in the English legal system, such as ‘agreement’, ‘arrest’, ‘estate’, ‘fee simple’, ‘bailiff’, ‘council’, ‘plaintiff’, and ‘plea’, etc (Table 3.3.). For more illustration of the result of old French and Norman influence, Alcaraz and Hughes (2002,

6) note the case of numerous legal terms ending in ‘-age’ that came into the language via French and bear the meaning of some specific service, right or duty, including the notion of indemnity, prize, reward, contribution, and many others as extracted from their research.

Table 3.3. Example of French words adopted in English legal discourse

French word or phrase adopted in English	French equivalent
Profit à prendre	<i>Profit à prendre</i>
Chose	<i>Objet</i>
Feme sole	<i>Femme non mariée</i>
On parole	<i>En liberté conditionnelle</i>
Salvage	<i>Prime de sauvetage</i>
Towage	<i>Droit de remorquage</i>
Pilotage	<i>Droit de pilotage</i>
Damage	<i>Dégâts</i>
Damages	<i>Domages-intérêts, etc.</i>

3.2.2. Sources of English Law

Like other legal systems, English law derives from varied sources, which include legislation by the Parliament, common law, equity, and the European Union.

- **Legislation:** This consists of statute laws made by Parliament either directly or indirectly (Hussain 1988, 4). Alcaraz and Hughes (2002, 49–52) refer to these in French as “*textes de loi*”, i.e. the written laws or legislation drafted and passed by Parliament. According to them, the principal written laws are known as Acts of Parliament (or ‘Acts of Congress’ in the U.S.), though there is also supplementary and delegated legislation like ministerial orders, local bye-laws, etc. Statute law is the highest source of law, and is binding on everyone, including judges.
- **Common Law:** This refers to body of laws based on judicial decisions and custom. According to Bailey and Gunn (1996, 4), ‘common law’ was the term that came to be used for the laws and customs applied by the royal courts which emerged after the Norman Conquest. However, Alcaraz and Hughes (2002, 49–50) note that the term has always been mistranslated in French as *droit coutumier*, which stresses the idea of custom, implying a “system of laws that are quaint, peculiar and local rather than a set of unwritten rules of universal application”. Their main argument against this translation is that: [A]ll modern systems of law take account of traditional social practice and the decisions of the higher courts in determining how the law is to be applied to a given case. There is therefore no very convincing reason why the English system alone should be described as ... *coutumier* when what is really conveyed by the term ‘common law’ is that the courts’ decisions are based on commonly or universally accepted principles. In this regard, the translation that is closer to the original meaning is *droit commun* to imply laws shared by the majority of community members, such as the following.

- **Equity:** This term refers to “certain concepts, principles and remedies [...] formerly excluded by the common law but were gradually recognised, developed and administered in the Middle Ages by Lord Chancellor in his role as ‘keeper of the king’s conscience” (Alcaraz and Hughes, 2002, 50). These laws came as a means of tempering the excessive rigour of the common law with a series of distinct principles based on natural justice.
- **Judicial precedent or case law:** this law was established by following *judicial* decisions given in earlier cases. Case laws are resorted to when judges of inferior courts follow the decision of the superior courts or if cases involving similar facts and points of law come before them, whether these decisions appear correct or not.
- **Custom:** practice which, through long-established usage, assumes the force of the law in the society.
- **Writings of eminent jurists:** they refer to writings of certain judges and jurists. Though these have no binding authority in themselves, they constitute an indirect source of the English law which can “influence judges in reaching their conclusions” (Hussain 1988, 9).
- **European Union:** Some rules of the EU laws are directly applicable in Britain and thus influence many laws made nationally.

3.2.3. *Jurisdiction and Court Structure in English Law*

In contrast with many countries with legal systems based on the continental or Napoleonic code of law that recognises four distinct jurisdictions (i.e. civil law, criminal law, administrative law and employment law), the English system distinguishes between two jurisdictions: the civil and criminal. According to Alcaraz and Hughes (2002, 52), a great deal of business conducted by the administrative and employment courts in many European countries is handled, under the British system, by a set of lower courts or quasi-judicial bodies known as ‘administrative tribunals’. The English legal system makes a distinction between the terms ‘tribunal’ and ‘court’. As pointed out in Bailey and Gunn (1996, 16), the term ‘tribunal’ can be used very generally to mean any judicial assembly, including a court. In this specific context, the concept of ‘tribunal’ is used to refer to specialised courts with special powers. The English civil court structure (Table 3.4.) has possibly been adapted from Alcaraz and Hughes (2002, 54).

Table 3.4. English civil court structure

House of Lords		
Court of Appeal (Civil Division)		
High Court of Justice		
Queen’s Division	Chancery Division	Family Division
Divisional Court	Divisional Court	Divisional Court
County Courts	-----	Magistrates’ Courts
	Administrative Tribunals	

In the case of criminal law, Alcaraz and Hughes (2002, 58) underscore the major distinction between Anglo-American Criminal law and ‘civil-law’ or ‘Roman-law’:

[T]he former is generally recognised as being adversarial rather than inquisitorial. The Crown (or the State, or the People) take the place of the plaintiff, rather than an ‘examining magistrate’ taking the lead in testing the evidence or pressing charges against an accused person. Besides apparent differences in their procedures, Alcaraz and Hughes (2002, 59) highlight major structural differences between English civil and criminal courts. English Criminal Court structure is as follows:

- House of Lords
- Court of Appeal (Criminal division)
- High Court of Justice
- Divisional Court
- Queen’s Bench Division
- Crown Court
- Magistrate Court

As was mentioned earlier, the English legal system has a variety of tribunals, which specialise in different areas. Those include:

- Social Security Appeal Tribunals
- Disability Appeal Tribunals
- Medical Appeal Tribunals
- Mental health Review Tribunals
- Child Support Appeal Tribunals
- Pensions Appeal Tribunals
- Industrial Appeal Tribunals
- Agricultural Land Tribunals
- Copyright Tribunals

Transport Tribunals, etc. Considering the nature of these courts and their specificity to the English context, a key question arises for translators: can

these names of English courts be translated or not? According to Alcaraz and Hughes (2002, 53), and as raised by many translators, there are two schools of thought in this regard. The first is the conservative modern view, which presents itself as progressive. It posits that no element in a text for translation capable of being regarded as a proper noun or a culturally bound unit should be translated. Using the terms of this trend, the appropriate 'technique of translation' in such cases is reproduction (i.e. non-translation). The second technique is to adapt the names by analogy whereby in the case of British 'Secretary of State for the Home Office', or 'Home Secretary' is referred to in some European language as the Minister of the Interior', or the Chancellor of the Exchequer is called the 'Minister of Finance'. In the view of this school "so long as excessive literalism is avoided and the resulting translations do not conflict with actual names of courts in the target-language system, these adapted forms will often be more acceptable than opaque formulations like 'The divisional Court of the Queen's Bench Division of the High Court of Justice'" (Alcaraz and Hughes 2002, 53). Here the crucial problem remains that of how the names of these courts can be translated into Kinyarwanda. A more puzzling question then is how Rwandan courts, let alone customary courts, can be translated into English.

3.2.4. English Court Procedures and Offence Classification

As Alcaraz and Hughes (2002, 59) assert, in all modern democratic states, private disputes that reach the courts in the form of litigation come down to confrontations or contests between two sides, with judges acting as umpires and applying the rules of the contest between the disputants. Alcaraz and Hughes (2002, 80) add that different procedural rules in English civil law have been reformulated to meet the following four main principles:

- simplification
- information technology
- case management

tracking With regard to criminal proceedings, Alcaraz and Hughes (2002, 89) point out three major features of the English system of classification and treatment of crimes that are likely to cause initial difficulty to the legal translator working between the English and one or other of the Continental or civil law systems:

1. The English Criminal Law is not organised into a single, coherent body or code as is the case in many other countries.
2. The English law no longer distinguishes by name between 'serious' and 'minor' or 'relatively minor' crimes. [...]; it is a matter of common sense that not all crimes are equally serious, nor are they all dealt with in the same way by the courts.
3. The English or common law system is unique in that the prosecution of crime is not the responsibility of the courts or the judiciary but is left in

the hands of state or administrative prosecutors who are ultimately answerable to the government. Contrary to what Alcaraz and Hughes (2002, 91) refer to as the Continental habit of identifying the offences by their degrees of seriousness, the English law distinguishes them by the mode of trial appropriate to each of them. Offences in the English law are identified as being one of the following:

- **Summary Offences:** lesser crimes, such as motoring offences fit for trial by the magistrates summarily i.e. before the magistrates themselves without jury.
- **Indictable Offences:** serious or very serious crimes (e.g. murder, rape or armed robbery, etc.), which must be tried before the judge and jury at the Crown Court, following a formal indictment by a representative of the Crown Prosecution Service (CPS). The case of the modern *Gacaca* law is however rather different from the above. The genocide-related crimes were classified following the role of each individual and the position s/he held in society. This is much more related to the context of the genocide that was organised by the government, which involved the population in its execution.

¹ As noted by David in his *French Law: Its Structure, Source, and Methodology* (1972, 1), the *Breviary* was an abridgement of Roman scholarly writings and legislation, which was prepared by the Visigothic king Alaric II for those of his subjects who were governed by Roman Law.

² See *Basic Structure of the French Legal System* (2001) by Cottin and Rabenou.

CHAPTER FOUR

Relevance of Culture and Context to Translation

4.1. Move from Equivalence to Culture-based Approaches

Since translation is an interlingual activity, which is referred to by Nida (1964, 4) as “translation proper”, its theories derive from several different disciplines such as linguistics, sociolinguistics, psychology, sociology, cultural anthropology, communication theory, literary criticism, aesthetics and sociosemiotics. Nonetheless, theorists have not ceased to feed new insights into the area, in the search for a more useful approach to the study of the diversity of translations in all their varied aspects to produce a ‘good’ translation. In this context, Tyler cited by Munday (2000, 26) defines a ‘good translation’ in Target Language (TL)-reader-oriented terms to be:

That in which the merit of the original work is so completely transfused into another language as to be as distinctly apprehended, and as strongly felt, by a native of the country to which that language belongs as it is by those who speak the language of the original work.

In this context, there is no way the target language speaker can apprehend that text in the same way as the source text speakers if the source language society, culture and the context that influenced the text production are not taken into consideration. This overrides purely linguistic approaches that were mostly developed in the second half of the 20th century. The important critic laid against these theories is that they approach the issue of translation from the viewpoints of linguistic differences between source and target texts. Following in the footsteps of Nord (1997) who sets her sights a bit higher, and avoids limiting her translation strategies to mere equivalence, in my translation of the modern *Gacaca* law, I do not rely much on the equivalence approaches. The main reason is that, as Nord (1997, 36) argues, “[E]quivalence may be one possible strategy when translating but it is not held to be a translation principle valid once and for all”. This is so because, I find that the once-dominant equivalence-based linguistic approaches have not really proven to be fully-fashioned enough to fit varied translational situations. In fact, equivalence-based theories are mere sociolinguistic constructs, which only focus on the source text and disregard the target audience. To deal with texts that are so culture-bound such as the *Gacaca* law, there is a need therefore to adopt approaches that totally tally with the main objective of this book: to produce a target text that provides some basic facts on the socio-cultural context of the source text.

The translation of *Gacaca* requires reaching higher levels that cannot be understood based on mere linguistic considerations. The reason is that, as Fawcett (1997, 2) explains, linguistics has a “number of limitations, especially if people want to see translation as an entirely linguistic activity or want to use linguistics as recipe giving ready-made solutions to specific

translation problems". In similar cases as that of the *Gacaca* law, as Newmark (1988, 23) advises, we need "to supplement the linguistic level, the text level with the referential level, the factual level with the necessary additional information (no more) from this level of reality, the fact of the matter". The relevance of this approach is that, as many theorists in translation studies have found out, there are many cases of non-equivalence in translation caused by pragmatic differences between source and target cultures. A very obvious example is provided by Nord (1997, 8) on the translation of a British School Certificate for a German University where the target text is not expected to look like, or function as, a German School Certificate.

Nonetheless, considering the nature of the *Gacaca* law, we find that its translation does not need to rely simply on function or purpose-oriented approaches. It should instead give enough room to culture and context that conditioned its production. In this regard, the description of its legal aspects should take into account the conventionalisation and institutionalisation of the communicative activities of the legal universe to which *Gacaca* belong. In this case, we will be able to produce a *Gacaca* target text that is understandable by a wider audience, and whose use is not necessarily limited to the circumstances of the 1994 genocide against Tutsi in Rwanda. Thus, this is the rationale behind my inclination towards the socio-cultural and contextual approaches to counter the weaknesses of linguistics, equivalence, function and purpose-based theories and hinge more on the theories generated from the cultural and sociological "turns" in translation studies.

For this specific case, my approach is structured around what Mary Snell-Hornby (1988) calls the "cultural turn". In their collection of essays *Translation, History and Culture* (1990), Susan Bassnett and André Lefevere reject the kind of theories of translation, which, in their view, "have moved from word to text as a unit, but not beyond". They also dismiss theorists in translation studies who painstakingly spend most of their time making comparisons between originals and their translations without considering the text in its cultural environment. In this perspective, Bassnett and Lefevere look at translation as an activity that goes beyond language *per se*, and focuses on the interaction between translation and culture, and on the way in which culture impacts on and constrains translation. Bassnett and Lefevere also consider a number of broader issues such as context, history and convention, and all of which are directly relevant in the translation of the law in question.

This trend suits better the translation of the *Gacaca* law inasmuch as the translator, I aim beyond words and sentences to confront translation problems inherent within the context and culture of the Rwandan society. In this translational activity, I commit myself to mediating from a system that has been restructured to meet the contemporary challenges of the 1994 genocide. This is what Lantolf (2000, 3) means when he says that each

generation reworks its cultural inheritance to meet the needs of its community and individuals. To back this idea, he gives an example of:

the cumbersome early computing machines which we were in awe of during the 1950s, today which have become sleek and much more powerful devices that have increasingly found their way into the daily lives of communities in many parts of the world. Likewise, languages are continuously remoulded by their users to serve their communicative and psychological needs.

This remoulding can better serve to tackle the problems involved in the translation of the *Gacaca* law in which I have to go beyond the surface structure of a text and consider the socio-cultural context of its production. Thus, in the translation of this text that draws much from a specific culture and a language remoulded to serve the current Rwandan community, the exploration of the theories of culture turns out to be essential. To this end, I find it important to bring in the “Iceberg theory” that was popularised in the work of Hall entitled *Silent Language* (1990). This theory advocates that “laws, customs, rituals, gestures, ways of dressing, food and drink and methods of greeting, and saying goodbye are all part of culture, but they are just the tip of the cultural iceberg”. Katan (1999, 29) explains that other (visible/hidden) divisions included Clyde and Kluckhohn’s “explicit” and “implicit” and Linton’s distinction between “covert” and “overt” culture. In this respect, Katan (1999, 30–32) presents Hall’s triad of culture at three distinct levels:

- **Technical Culture:** (this is concerned with communication at the level of science, that which can be measured accurately, and has no meaning outside itself).
- **Formal Culture:** this deals with equivalence at the denotative level. It is the culture of traditions, rules, customs, and procedures and so on.
- **Informal Culture or Out-of-awareness Culture:** this form of culture is neither taught nor learned, but acquired informally and, even more importantly, ‘out-of-awareness’. This is at the level of connotative meaning and it is at this level that we judge and react to words.

A hybrid system like the *Gacaca* law, i.e. that combines tradition and modernity, cannot lack elements of technical culture, to say the least. It has some units whose concepts can be accurately determined. These aspects do not cause much trouble since they can easily be translated by mere match with their counterparts in the target language system. The text also has a significant number of its elements that may fall under the category of formal culture. This is because the *Gacaca* system contains numerous traditions, rules, customs and even procedures, which, in the tradition, had some accepted ways of handling cases depending on circumstances. Moreover, the law has some features of informal culture: the fact that the system used “judges” who did not undergo formal training in law can serve as a good example. As was the practice, wise people with integrity could

fairly handle civil and criminal cases without resorting to classical judicial procedures that we know today. The translation of these facts can never be straightforward. Based on the observation from Steiner (1998, 495), I find that any models that “drastically schematise their material” and neglect “the social, cultural, historical determinants of human speech” cannot help in the transfer of such socio-cultural features embedded in the *Gacaca* law into French and English. Instead, its translatability calls for theories that do not trivialise “the relation between language and mind, between language and social process, between world and culture” (Steiner 1998, 496). This study should therefore avoid this trap of belittling the above dimensions insofar as it suggests a translation model that contrasts and compares cultures. This is what Nord (1997, 34) explains:

Translators interpret source culture phenomena in the light of their own culture-specific knowledge of that culture, from either the inside or the outside, depending on whether the translation is from or into the translator's native language –and–culture. A foreign culture can only be perceived by means of comparison with our own culture.... Everything we observe as being different from our own culture is, for us, specific to the other culture.

In general, a thorough study of the problems involved in the translation of the *Gacaca* law is construed in the framework of different theories of translation. Nonetheless, to address heavy challenges posed by such culture-bound texts, more weight should be attached to the socio-cultural theory to cover the maxim of the source and target text systems. Following the deductive approach that is presented by Bryman (2008, 9–11), my move from equivalence to culture-based theories serves to test the main hypothesis I initially had in mind: “*the target audience does not fully understand the Gacaca law because its translation did not take into consideration some of its features, especially the socio-cultural context of its production*”.

4.2. Gearing Socio-cultural and Contextual Models to Legal Translation

Many studies have been carried out to identify and analyse translational problems involved in the translation of legal texts from different language systems. In his study, Houbert (2005) found that legal translators encounter the following main problems: archaic nature of legal language, use of Latin expressions, ambiguity of legal texts, polysemous terms, and cultural problems. However, Houbert was caught up in a trap, like many other experts in the field, of limiting translation to the linguistic level as proved by his own words: [*Les problèmes rencontrés lors de la traduction juridique sont principalement de deux ordres, syntaxique et terminologique* (Houbert 2005, 97) (there are two main problems encountered in legal translation: syntactic and terminological)]. In the same vein, in her paper, Altay (2002) presents a similar view. She discusses semantic and pragmatic models concerning phraseology and textology in doctrines in international law, and comments on parallel textuality in legal matters. Like any other

specialised field, Altay points to the technicality of language used in the domain of law, contending that it is different from ordinary language with respect to vocabulary and style. According to her, legal language is characterised by the use of long sentences, an abundant use of unusual sentence structures and flexible or vague language. She also touches on another important feature of legal homonyms. This concept was introduced by Tiersma, quoted in Altay (2002), to refer to cases in legal language in which many words have a legal meaning, which is very different from their ordinary meanings; the legal vocabulary that looks like ordinary language, but which has a different meaning peculiar to law. Citing Mellinkoff, Nico (1984, 4) also describes this aspect as one of the major characteristics of legal language that uses “common words with uncommon meanings”.

Ordinary and Technical Meaning

The dichotomy between ordinary meaning and technical legal meaning of some legal concepts can be found in any legal system. To go about this, Cao (2007, 67) advises the legal translator “to identify the legal meaning and distinguish it from its ordinary meaning before rendering it appropriately into the TL”. For instance, in translating English contracts or documents related to contract law, Cao lists legal terms frequently encountered: ‘offer’, ‘consideration’, ‘performance’, ‘remedy’, and ‘assignment’. These words in English have an ordinary meaning used in non-legal settings. They are also legal technical terms that carry special legal significance in contract law. On the contrary, in the English contract law, ‘offer’ refers to a promise which when accepted constitutes an agreement. However, as in the case of *Gacaca*, this approach becomes more troublesome especially when the translator is seeking to comprehend meaning from the standpoint of an entire legal culture.

Legal Ambiguities and Jargon

Another characteristic of legal language is the frequent use of jargon. In my M.A. thesis, I found that the choice and the knowledge of the appropriate words in the translation of legal texts is a challenge for the translator. In this area, I showed a number of words that present ambiguities when translated into Kinyarwanda; or which do not exist at all in the Rwandan legal system:

- (1) the French word ‘justice’, which is the same in English, becomes ambiguous when translated into Kinyarwanda and could either mean *ubutabera* (to mean equity, fairness) or *ubucamanza* (judgement pronouncement or justice administration) (Ngarambe 2004, 8).
- (2) the French word ‘dispositions’ in legal language that means “*clause d’un acte juridique (contrat, testament, donation)*” [clause of a judicial act (contract, testament, donation) (my translation)] is either omitted or given the meaning of the word ‘article’ in legal translations from French into Kinyarwanda (Ngarambe 2004, 55–56).

In legal translation, such ambiguities are very dangerous for, as Thornton quoted by Sagi (1983, 4) observes, “an ambiguity in a legal instrument may cause debates and arguments that can be cured by questions and answers”. Hence, the better way to prevent this situation is to use appropriate words in both the drafting and translation processes of any legal text. This can help avoid subsequent misinterpretations of the legal instrument. According to Cao (2007, 72), “legal disputes often arise from linguistic uncertainty found or allegedly found in contracts and statutes”, and these mostly result from lexical and structural or syntactic ambiguities. Cao (*ibid.*) illustrates this with the following examples: words such as ‘light’ or ‘right’, used as a noun and as an adjective, which can have more than one meaning, depending upon how they are used. To these, he adds a case, cited by the 20th century influential legal philosopher Herbert Lionel A. Hart, where a testator leaves his ‘vessels’ to a legatee. Did the testator mean to refer to his crockery or to his yachts or to both? In view of these cases, Cao (2007, 73) notes: “linguistic and legal uncertainty/vagueness, generality and ambiguity are distinguishable, but they are also relative, and sometimes may overlap”. What is more embarrassing is that, as Cao (2007, 121–122) stresses, in legislation “words are points of legal contention for both monolingual and bilingual jurisdictions”, and judges are sometimes asked to adjudicate. As explained in the next sub-section, the translation of these words becomes extremely complicated when they bear a lot of cultural and institutional aspects from the source legal system.

Apart from the lexical level, Houbert (2005, 97) touches slightly on cultural aspects that hinder the legal translation activity when he refers to names of institutions and positions, and official designations as terms with a functional equivalence in the target language:

On y trouve d'abord des termes pour lesquels il existe un équivalent fonctionnel. Ces termes, dont Lord of Chancellor, Home Secretary et Appeal Court constituent quelques exemples, renvoient à des institutions et à des fonctions certes propres à la culture source mais qui représentent toutefois suffisamment de similitudes avec des institutions de la culture cible [...] (Houbert 2005, 103).

[There are terms which have a functional equivalent. The terms which include, for example, ‘Lord of Chancellor, Home Secretary and Appeal Court, etc. refer to institutions and functions which are absolutely source culture-bound but which bear some similarities with target culture institutions].

In order to transfer the meaning of these terms into the target language, the translator needs to have sufficient knowledge of the source and target societies and their structures. A social structure is referred to by Thompson (1984, 129) as a series of elements and their relations which conjointly define the conditions for the persistence of a social formation and the limits for the variation of its component institutions. Any human society or community is characterised by institutions that contribute to its

organisation. Some of these are common to any society and they “represent necessary conditions for the persistence of social life” (Thompson *ibid.*). However, there are some other elements that are particular to a given society depending on the context of their use. Hence, the way of living of its people cannot necessarily be equated with those of other societies. Rwandans live and behave differently from the French and the English people, and all the differences are reflected in their different cultures. This implies that a successful legal translator should be endowed with enough competence in the source culture. Nevertheless, knowledge of the source culture is not an end in itself for the translator to carry out his translational activity properly. This is because the latter is inherently a cultural mediator between two different parties. Taft quoted by Katan (1999, 12) refers to this concept of cultural mediator as a “person who facilitates communication, understanding, and action between persons or groups who differ with respect to language and culture”. In this respect, the role of the translator as a mediator is performed when he succeeds in interpreting expressions, intentions, perceptions, and expectations of each cultural party. Henceforth, according to Taft cited by Katan (1999, 12), a cultural mediator is required to have “knowledge about the society”, and this implies a number of aspects: history, folklore, traditions, customs, values and prohibitions.

4.3. Legal Translator: Bi/Multilingual or Bi/Multicultural Mediator

A translator’s cultural knowledge should cover at least the two languages or societies he works in. This bicultural quality of the translator is discussed by a number of researchers in translation studies. Citing Vermeer, Snell-Hornby (2006, 52) thinks that “the translator should not only be bilingual, but also bicultural”. In this regard, Snell-Hornby (1992) views a translator as a cross-cultural specialist; Hewson and Martin (1991, 133–155) view the latter as a translation operator or cultural operator, whereas Neubert and Shreve (1992, 54) indirectly refer to the translator as a “knowledge breaker between the members of disjunct communities”. This implies that the translator’s mediation role is determined by his ability to understand the structure of both the source and target cultures of his working languages. This ability is what augurs the translator’s good performance as emphasised by Katan (1999, 125): “an essential difference between a traditional translator and a mediator is the mediator’s ability to understand and create frames”.

Katan’s view that a translator should be able to understand cultural frames brings us to understand that translation is an activity of transferring meaning across languages and cultures. This does not differ from Snell-Hornby’s position that the translation process can no longer be perceived as being between two languages, but between two cultures involving “cross-cultural transfer” Katan (1999, 126). Snell-Hornby’s view does not differ from Nord’s at all: “translation is a transcultural action or communication across culture” that has to take into account “cultural differences with

regard to behaviour, evaluation and communicative situations” (Nord 1997, 33).

This mediatory role of a translator helps the sender and the receiver belonging to different cultures to understand each other, which requires the former to adopt adequate strategies for cultural transfer or mediation. As Nord (1997, 17) notes, the translator's mediatory role does not always involve “translating in any literal way”. This requires more culture-oriented approaches that go beyond words. Gentzler (1993, 77) adopts the same view that the translator's “mediation role is more than synchronic transfer of meaning across cultures, it mediates diachronically as well, in multiple historical traditions”. In the same line of argument, Nord (1997, 17) admits that most translators do their job correctly in this manner: “quite regularly translators do much more than translating texts”.

However, I do not think that it is easy to determine whether those who translate beyond words constitute the majority of all the people involved in the translation industry! In any case, it has become evident that on the current translation market, there is a significant number of translators who do not care about culture in their translational activities. To these, Kondo quoted by Katan (1999, 13) issues a stern warning that, in the translation of culture-bound texts, the “word-for-word correspondence between the source and the target has virtually no place”. This means that translators should transcend the scope of words and sentences to understand people's ways of living, customs and beliefs. This move becomes much more opportune when dealing with legal texts, especially the translation of customary laws such as Rwanda's *Gacaca*. This view is supported by Cao (2007, 1) as follows: “translating law between any languages is not a straightforward affair”. In her view, the reason is that the translation of law plays “a very important part in the contact between different peoples and different cultures in history, and in our increasingly globalised world”.

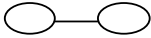
Difference is the ‘common denominator’ of our world! People in this world live, think, speak and behave differently, and these cultural gaps constitute very stiff barriers in any inter-cultural communication. According to Katan (1999, 41), these cultural differences can be manifested in a wide variety of ways. Over some of the differences, such as ethnic group or race, gender, family, region and generation, we have little or no choice. However, there are also other differences, such as neighbourhood, friends, education and profession, that may be a result of personal choice. All these differences are conveyed through our languages that help to construct what we deem to be the reality to communicate to others or to share within our community.

4.4. Translating Culture: Reality Construction

According to Steiner (1998, xiv), “a language contains within itself the boundless potential of discovery, of re-compositions of reality, of articulate dreams, which are known to us as myths, as poetry, as metaphysical conjecture and discourse of the law”. Depending on our experience and

world knowledge, we can construct reality in our own way. In the same line, Katan (1999, 90) alludes to this issue of reality construction as follows: “reality is what our language says it is”. Similarly, Baker (1992, 219) notes that language depends on the “hearer’s or reader’s expectations and experience of the world”. As Katan (*ibid.*) illustrates, “we depend on making use of our own internal categorisation rather than actually listening to what we hear or reading what we see.” (see Table 4.1 for some illustrative examples of reality construction).

Table 4.1. Illustrative examples of reality construction

Concept	Reality 1	Reality 2
	Crescent	letter “C”
	Glasses	Dumbbells

SOURCE: Adapted from Katan (1999, 90)

The table shows that our understanding of the world depends on our mind construction, which can produce two different “realities” for one concept. This is what Katan (1999, 92) explains when he asserts: “As our understanding of the world depends on a previous construction of a suitable mental image, it is consequently very difficult to be objective about reality, or to state what is actually, objectively and intrinsically true ‘out there’”. In the case of the *Gacaca* law, one may question the structure and competence of its courts, the powers vested in its judges (*inyangamugayo*), its legal procedures, and many more issues. However, it would be difficult or even impossible to understand the essence of that law if we do not understand how the Rwandan society constructed the reality embedded in it at the time of conceiving the *Gacaca* law. This reality is also dependent on culture of which language is part. For example, Halliday (1992, 72) shows how social reality about sex is dealt with in Australia:

We [in Australia] have a Scientific Commission on Language and Sex to deal with the situation (and note in this connection that it is *assumed* that by working with language you can change social reality, which makes sense only if you can accept that reality is construed in language).

It is in this context that Katan (1999, 89) refers to the components of culture, namely physiological, social engineering (culture), individual and language, as ‘cultural filters’. According to him, these heavily “affect perceptions of reality”. Katan adds that, in these filters, “[T]here is a universal modelling of reality which functions in the same way as a map. In communicating our understanding of the world, a further filter, language, constrains and distorts reality” (Katan 1999, 89). In the same angle, I find

the four categories of culture suggested by Newmark (1988, 95) very relevant to the translation of *Gacaca*:

- (1) Ecology, which includes flora, fauna, winds, plains, hills;
- (2) Material culture, which includes food, clothes, houses, towns and transport;
- (3) Social culture, including work and leisure; and
- (4) Organisation, customs, activities, procedures and concepts. Organisation includes political and administrative, religious and artistic organisations.

In this case, the social organisation of culture, described under category four, consists of political and administrative components. This corresponds to the observation by Newmark (1988, 99) that “the political and social life of a country is reflected in its institutional terms. This is the case of some names of institutions that are not easily translatable from one administrative system into another. These terms constitute one of the major problems in legal translation, and the *Gacaca* law, which is a traditional law that was adapted to fit contemporary Rwandan administrative structures, is not an exception.

4.5. Language as an Intrinsic Part of Culture and Medium of Meaning

With reference to Snell-Hornby's definition of the concept ‘culture’ as a ‘totality of knowledge, proficiency and perception’, I totally agree with Nord's stand that “language is an intrinsic part of culture”. Nida (2001, 14) puts this more clearly saying that language constitutes the most distinctive feature of culture, and according to him, though “language may be regarded as a relatively small part of a culture, it is indispensable for both the functioning and the perpetuation of the culture”. Accordingly, in my view, competent translators should always be informed that words only have meaning in the context of their corresponding culture. It is in this context that Nida (2001, 26) goes a step further not to associate language with only culture but also with society: “differences in culture mean differences in language”. A more convincing explanation that Nida (2001, 27) gives to this is that language represents the culture because the words refer to the culture, as the beliefs and practices of a society. As a medium of communication between participants within a given culture, the latter uses language to channel all intercultural communications. In this context Nida (2001, 25) identifies four uses of language by culture:

- (1) providing information about the processes and values of a culture;
- (2) directing the activity of a culture;
- (3) establishing and maintaining a positive emotional state for the participants within a culture;

- (4) ritual alteration in the status of participants in a culture; for example marriage vows, sentencing of criminals, religious ritual, the interment of the dead, etc.

As a result of these uses, members of a society are the ones who feel the need to alter any aspect of their culture. All this action is done through language, and the translator should be able to capture that change and adapt it to the target culture. This is what Nida (2001, 69) refers to as the translator’s “rapid recognition of organisational features and their roles in discourse”. According to him, these can help him realise that what is “excellent for one language-culture does not fit easily into the patterns of other language-culture”. For instance, Nida (*ibid.*) provides the case of many traditional novels and short stories in Chinese which have unhappy endings. If a translator needs to translate them, he may decide to domesticate those endings or adapt them to the target language practices.

In addition, within culture, language stands out to be the main medium of meaning. This is possibly what Thompson (1984, 132) intends to mean when he says that the meaning of an expression is an essentially open, shifting, indeterminate phenomenon often framed in rhetorical figures and always susceptible to change. Thompson (1984, 146) adds that “it is through language that meaning is mobilised in the social world”. Therefore, language may have certain meaning depending on the culture and society in which it is used and interpreted. This is what Katan (1999, 59) expresses:

Meaning attached either to a visible behaviour or to a word itself has little or nothing to do with reality. It has to do with individual or collective beliefs. Word meaning can be understood on a technical (denotative) level, a formal or an informal (connotative) level.

To illustrate this, adapting from Katan (1999, 60), I can draw the some connotative meanings which depend on one’s territorial, political and religious beliefs (Table 4.2).

Table 4.2. Examples of words with both denotative and connotative meanings

Word	Meaning according to belief
Fundamentalist	1. Saviour 2. Fanatic
Capitalism	1. Freedom to manage property for profit 2. Exploitation of man by man.
Privatisation	1. The country is better off 2. The country is worse off

In relation to this, I can quickly generate a list of many more other examples of expressions that have acquired special meaning due to their change in use in the history of a given society:

- 1) The words *alquaida* for Americans. This is an Arabic word that normally means 'the base' but now it is an international Islamic organisation, established by Osama Bin Laden, associated with several terrorist incidents, including the attack on the World Trade Centre, New York on September 11th, 2001.
- 2) *Interahamwe* for Rwandans. Originally, this word means people who unite for a common goal. Later with the Rwandan genocide, the meaning changed. Referred to in "Talking about Genocide" by Peace Pledge Union Information as "the men who had been trained to massacre". They were members of civilian death squads to kill Tutsis and moderate Hutus in the Rwandan genocide. In contrast, it is also defined in AudioEnglish.Net as a terrorist organisation that seeks to overthrow the government dominated by Tutsis and to institute Hutu control again. In most speeches and writings, the word is also referred to as *génocidaires*.

Apart from their denotative meanings, the first connotes a terrorist organisation whereas the second is associated with the implicature of death squad. According to (Katan 1999, 60), the problems that arise in the translation of such meanings are twofold:

- 1) Meaning is not inbuilt but interpreted according to individual and culture-bound beliefs.
- 2) There is a widespread belief that translation of the denotative meaning automatically assures a good translation.

In the same way, Malinowski (1923/1938, 305) adopts the position that "language is essentially rooted in the reality of culture". Based on this, he creates the concept of 'context of situation'. Furthermore, language is also regarded by Lefevere (1992, 17) as "the expression and repository of culture". According to him, "many of its words refer to a reality that no longer exists: things and concepts die, but the words used to express or denote them may survive for centuries or just decades". To support this view, he gives an example of "Hokeypokey", a brand of cheap ice cream which was sold in the United States in the 1920s. The concept no longer exists, but the word is still there. In Rwanda, due to the existence of the modern legal system, the concept of *Gacaca* no longer refers to the organised traditional judicial system to handle some minor disputes or negotiations. Today, one can safely invite someone 'to go to *Gacaca*' to perform several actions: to say, debate, decide, discuss or negotiate.

4.6. Culture and Context of Situation in Translation

"There is always a context in which translation takes place, always a history from which a text emerges and into which a text is transposed [...] translation as an activity is always doubly contextualised, since the text has a place in two cultures" (Bassnett and Lefevere 1990, 11). Still in the same line of argument, the idea by Malinowski (1923/1935), later fully

recapitulated by Katan (1999, 72), is that a language can only be fully understood, i.e. have meaning, when these two contexts (situation and culture) are implicitly or explicitly clear to the interlocutors or hearers. It is at this level that both communicators perceive the reality transmitted through the language. Quoting Schutz, Bryman (2008, 1) refers to this as “social reality” that has a “specific meaning and relevance structure for the beings living, acting, and thinking within it”. In my understanding, the context of a situation may not necessarily be common to all subjects involved in communication. Nonetheless, the translator has no excuse to ignore the cultures of the systems he is working in if he commits himself to handling all the translational problems adequately. Dealing with the translation of literature, Lefevere (1992, 13) reminds us that “translation problems [...] occur within a given text, [...] they are not context-free, and that given texts are also not context-free”. In his view, these problems are “produced (and reproduced) within the confines of a given literature, which has its own generic and stylistic features and which is, in its turn, embedded in a whole culture”.

Nord (1997, 1) supports this by saying that “situations are not universal but are embedded in a cultural habit, which in turn conditions the situations ... communication is conditioned by the constraints of the situation-in-culture”. To elaborate on this view, Nord (1997, 11) states: “since situations are embedded in cultures, any evaluation of a particular situation of its verbalised and non-verbalised elements depends on the status it has in a particular culture system”. To illustrate this Nord (1997, 11) cites the following example from Vermeer:

Suppose we were to observe an Indian getting up in the morning. We see him get out of bed, take a shower, brush his teeth and cleanse his mouth, put on clean clothes, pray, take a cup of tea and so on. If we ask him to describe his behaviour he would mention his shower (which he'd call a 'bath', if he speaks English) and perhaps forget about the tea. Suppose now, we would also observe a German during his morning ritual. We would see much the same procedure, although with certain differences in the way he would take his shower and put on his clothes; he, too, would have his breakfast (and perhaps brush his teeth afterwards). Asked about his behaviour he would certainly not forget to mention his 'buttered bread and coffee' and just as certainly would forget about his brushing his teeth. The descriptions of the two individuals from two different cultures would differ to a greater or lesser extent, but they would be culturally equivalent, both being considered natural behavioural acts with the same 'function' in their respective culture specific settings.

For the case of Rwanda, the 1994 genocide is reported to have been the most atrocious in contemporary times compared to others that happened in other countries. Though acts of genocide have many things in common, the Rwandan one was the deadliest for it took away over a million lives. Besides, more than a million people were involved in the killings. How

then can this context of situation be dealt with using modern statutory laws? The solution of reviving the *Gacaca* system and adapting it to handle the consequences of that unique situation seems much more appropriate. However, when it comes to its translation, it calls for special strategies in order to be accommodated in other target systems, leave alone being understood by an audience with little or no familiarity with the Rwandan situation. According to Nord (1997, 23), “translation takes place in concrete, definable situations that involve members of different cultures”. This implies that the translator has to take into consideration “the concrete situations in which the language was being used and the things being done with language in that situation” (Fawcett 1997, 72). Situations determine the context in which something takes place, and I find that this as another significant aspect that should not be underestimated in translation because it is very much linked to reality. Katan (1999, 36) refers to context as an “external representation of reality”. In any case, our context is characterised by beliefs and values that we hold dear, and these contribute to the shaping of our society, reality and identity. Katan (1999, 39) explains this transitive relation as follows:

Beliefs embody values. Our core values are the basic unconscious organising principles that make up who we are. Once they are formed they very rarely change. If they do change, then our identity, who we are, will also change. Values and beliefs will be determined by the type of person, organisation or culture in that particular context.

Contexts are culture-specific, and so are concepts. The way concepts are perceived is determined by culture. This is what Katan (1999, 86) means: “though languages can convey concepts from other cultures, people (including translators and interpreters) tend not to realise that their perception (through language) is, in fact, bound by their own culture”. In this regard, Newmark (1988, 94) is much more specific by distinguishing what he calls ‘cultural’, ‘universal’ and ‘personal’ language. In his view, cultural language contains words, which are admittedly overloaded with cultural connotations. Newmark (1988, 95) adds “most cultural words are easy to detect since they are associated with a particular language and cannot be literally translated”. In the very specific case of *Gacaca*, the best translational solution is to adopt the advice from (Hickey 1998, 50): “to bring the reader to the original”, which requires him to “process the translation in the context of the original”. In this regard, I advise the translator to take the target reader to the situation of the original text with all its reality, which is foreign to him. This is what I did in this book, namely, collecting all the relevant information that would shed some light on the context of the *Gacaca* law.

In the case of legal translation, even in the selection of appropriate terms, Alcaraz and Hughes (2002, 178) remind anyone who has ever translated legal texts that ‘such complex choices are not amenable to pure laws of predictability’. In their view, “the selection of the best, or the most

appropriate, or the most natural or effective term will always depend also on other factors, such as context, traditional usage, genre and even subgenre". For example, the expression "constructive manslaughter" can be defined in different ways. But as Alcaraz and Hughes (2002, 25) point out, what shifts in these definitions is not really the meanings of words, but the set of possible circumstances the designated terms were originally meant to cover. This is the context of the source text production and constitutes one of the major problems that a translator has to handle in the translation process. For more clarity, Alcaraz and Hughes (2002, 37) break context into three heads:

- 1) The context of utterance i.e. the immediate physical and temporal environment in which the communication takes place.
- 2) The context of immediate verbal environment in which the utterance is situated.
- 3) Sometimes referred to as 'co-text', this type of context consists in the words or sentences that precede and follow it in the same text.
- 4) The extralinguistic context, which consists of habits, expectations and conventions characteristic of the society concerned. In the case under study, these aspects refer to the world of lawyers and the law, with its customs, its practice, its assumptions, its values and procedural routines. Alcaraz and Hughes' argument suggests that, in any legal interpretation, context is of paramount importance. This is the same context that the translation of the modern *Gacaca* law should never miss.

4.7. Legal Translation: A Socio-political and Ideological Activity

According to Katan (1999, 19) the "bias towards one or another culture tends to be ideologically based". However, this is not only limited to people's ideology because "the issue that is raised by the use of real-life material is social, political and ideological, and that the difficulty of understanding cultural codes stems from the difficulty of viewing the world from another perspective, not of grasping another lexical or grammatical code" Kramsch (1993, 11). In some cases, politics dictates which language to use. This political influence is referred to by Katan (1999, 75) as "political correctness". Though it dominates most of the social science arena, he severely criticises this trend for "limiting intellectual and artistic freedom". Katan (1999, 78) provides an example from Jane Gordon who describes with dismay in the *Conservative Daily Telegraph* (03/03/95) how her American book editor tried to change a number of words in her book under the pretext that the words were not politically correct and might upset or offend the reader.

In any case, legal translation is not spared from all these socio-political and ideological challenges. In all my translation assignments, I have found that legal translation is an activity that raises problems at different levels. In the

case of the *Gacaca* law, some of its factors are easily translatable, and others, especially those related to differences, require going beyond the words in the text, and socio-political and even ideological aspects that influenced its production. Snell-Hornby (1988, 2) adheres to this principle:

In translation, the text cannot be considered as specimen of language, but essentially as the verbalised expression of an author's intention as understood by the translator as reader, who then creates this whole for another readership in another culture.

While transferring the source language content into the target language system, the translator is required to comply with briefs from his clients whose demand is generally, as Nida (2001, 3) puts it, "first and foremost accuracy. If a translated text can also be easy to read, this is indeed a plus, and if it can be culturally appropriate the translation is obviously a success". At this level, I am tempted to add that if the target is politically and ideologically correct, it is added-value. This condition also applies to the translation of the *Gacaca* law which draws a lot from the Rwandan political and ideological context. To gear the socio-cultural and contextual model to the translatability of the *Gacaca* law, I do not only rely on the analysis of primary information from the corpus. I instead sought to employ a multi-method approach that combines two main language-based approaches: discourse analysis of the *Gacaca* law documents and qualitative interview. This was intended to ensure a high level of congruence between the research theory, concepts and the participants' views. To collect views from the selected respondents, I resorted to interview which, with some caution, Bryman (2008, 436) asserts to be "the most widely employed method in qualitative research". The method is chosen for two main reasons:

- (1) Its flexibility in capturing all the issues that emerged in the course of the interview; and
- (2) Its provision of greater possibility to capture the interviewee's point of view and understanding of the selected areas of difficulty in the translated *Gacaca* law.

In the analytical phase, I explain contextual variables involved in the translation of the law under study by employing the causal model presented by Williams and Chesterman (2002, 53). More specifically, at this level, I consider the socio-cultural variables which, according to Williams and Chesterman (2002, 86), include norms, cultural values, ideology, etc. Along this line of argument, since there are many dimensions of causation that are relevant to translation, I place the main focus on the socio-cultural level to show how a translation can have effects on the socio-cultural levels in a given society, and have a huge influence on how one culture perceives another, and hence on intercultural relations. From the outset, I adopted model that helps to formulate my main hypothesis and respond to one of my main research questions: *Has the translation of the Gacaca texts used*

appropriate theories and strategies to meet the understanding of the target language audience?

To fine-tune the analysis of the *Gacaca* source and target texts to the socio-cultural model within the theoretical dimensions presented in this chapter, I apply mostly a discourse analysis approach to analyse and interpret both primary and secondary data. I adopted this approach because it is constructionist in that, as Bryman (2008, 500) explains, its emphasis is “placed on the versions of reality propounded by members of the social setting being investigated and on the fashioning of the cultural reality through their rendition of it”.

At a more advanced level, I use a critical discourse analysis (CDA) approach to analyse “the role of language as a power source that is related to ideology and socio-cultural change” (Bryman 2008, 508). At this level, I had in mind the view by Bryman (2008, 508) that the role of the discourse analyst is “to explore the relationship between discourse and reality”. Still guided by the same methodological principles, my analysis made an attempt to address four sets of organisational research issues as identified by Fairclough (2003, 931–933):

- 1) **Emergence:** founded on the notion that “new organisational discourse emerges through reweaving relations between existing discourse”.
- 2) **Hegemony:** focusing on how particular discourses become hegemonic in particular organisation and on ‘how discourse figures within the strategies pursued by groups of social agents to change organisations in particular directions’.
- 3) **Recontextualisation:** involving identification of the principles through which ‘external’ discourses are internalised within particular organisations.
- 4) **Operationalisation:** focusing on how discourses are operationalised, transformed into new ways of acting and interacting, inculcated into new ways of being, or materialised, within organisations.

In an organisational context, the critical discourse analysis approach contributed to tracing how the *Gacaca* discourse which was used in the past to handle minor legal matters could be reconstructed, maintained and reproduced to address modern criminal cases of the 1994 genocide.

CHAPTER FIVE

Major Challenges of Translation in *Gacaca* Law

5.1. Analysis and Translation of Some Selected Legal Aspects

Within the scope of this book, I analysed and translated legal aspects that are more likely to cause problems in the translational process of the *Gacaca* law under the following three main themes: (1) Rwanda's indigenous legal elements incorporated in the *Gacaca* law; and (2) Modern legal elements incorporated in the *Gacaca* law. Both source and target texts of the original modern *Gacaca* law are presented in a table of three columns as it appears in the *Official Gazette*. The table is followed by an analytical part highlighting differences between the source and target texts and how these could be overcome to make the *Gacaca* law more accessible and understandable by the target audience. At the end of each discussed aspect, I devise a translation model accompanied with some background information in square brackets together with some corrections shown in bold.

Theme 1: Indigenous Legal elements Incorporated in the *Gacaca* Law

Aspect 1: Composition of the *Gacaca* Court Bench

The statement on the composition of the *Gacaca* court is available in the three languages (Table 5.1).

Table 5.1. Original version of Article 8 (Modified and completed by Organic Law n° 10/2007 of 01/03/2007, *Official Gazette* n° 5 of March 1, 2007)

Kinyarwanda	French	English
Buri <i>Nteko</i> y'Urukiko Gacaca igizwe n'abantu icyenda (9) <i>b'inyangamugayo</i> , kandi ikagira abasimbura batanu (5).	Chaque Siège de la Juridiction Gacaca est composé de neuf (9) personnes intègres et dispose de 5 remplaçants.	Each bench of the Gacaca Court is made up of nine (9) persons of integrity and 5 deputies.

This provision adopts the traditional concepts to determine the number of *Gacaca* judges referred to as *inyangamugayo* who should constitute a bench in a *Gacaca* court referred to as *inteko*. The word *inteko* originally means the 'chair of the king', and later its use was extended to the panel of judges, and nowadays, to the Parliament. The translation of this provision presents a serious problem because the traditional *Gacaca* bench did not have a precise number of *inyangamugayo*. Though the statute law determines the number of judges who should constitute a bench, from one to three depending on countries, it can never reach nine members. Hence, to handle this aspect of the composition of the bench in the modern *Gacaca* law, the translator should have background knowledge on the functioning and organisation of the *Gacaca* and statute law systems.

In an attempt to solve the above problem, the respondents were asked to provide their views on what they knew about this aspect of bench composition and the effect it has on the understanding of the entire article. In their responses, all the respondents admitted that the traditional *Gacaca* courts did not have any limited number of *inyangamugayo* to deal with a particular case. The respondent from one Human Rights organisation expounded on this issue: “The number of *inyangamugayo* that sat on the bench was not fixed but persons of integrity and respect were always selected by the community”, and almost all members from the selected groups agreed on this point. However, one respondent specified that the bench of *inyangamugayo* was made of about five people. According to one respondent from the group of elders, it was not necessary for the contending parties to have the same number of judges, since their ultimate objective was to correct and reconcile conflicting parties. Some families were bigger than others but this could not deny justice to smaller ones. Some respondents from the group of historians thought that the inclusion of this provision into the modern *Gacaca* was relevant in meeting the current socio-economic challenges in Rwanda.

However, one lawyer from MINIJUST found the number provided for in the modern *Gacaca* courts too big:

Dans les conditions actuelles, le nombre de 9 personnes intègres pour siéger ou même 5 après la modification de la loi, est un grand nombre si on fait une comparaison avec les juridictions ordinaires où un seul à trois juges siègent (sauf dans la Cour Suprême) où ce nombre peut dépasser trois juges suivant la nature de l'affaire [Field data].

[Considering the current conditions, the number of 9 *inyangamugayo* required to sit in the *Gacaca* courts, even that of 5 that was provided for after modification of the organic law, is a very big number if comparison is made with the statute law courts where from only one to three judges sit (except in the Supreme Court) where this number can go beyond three judges depending on the nature of the case to be handled].

Despite the above differing opinions on the number required to constitute a bench of *inyangamugayo*, all the respondents agreed that it had to be big enough to ensure equity. According to lawyers and advocates, this could facilitate the process of reaching collegial decisions. One of them noted emphatically that the collegial structure was a salient characteristic of the traditional *Gacaca* courts:

C'est le système de collegialité qui a caractérisé même l'ancien Gacaca et que l'on retrouve dans notre droit positif seulement au niveau de l'appel. [This is a collegial system that also characterised the traditional *Gacaca*, and which is now used in our modern positive law but only at the level of appeal].

In solving the problem stated above, some background information is useful to show how and why the modern *Gacaca* has borrowed from the

traditional *Gacaca* to produce a hybrid law. This explains the importance of the traditional socio-cultural concept of team-work in making decisions. This solution considers *Gacaca* as the backbone institution of justice in the Rwandan society. This modern conception of the bench composition provided for in the modern *Gacaca* is one of the elements that “represent necessary conditions for the persistence of social life” (Thompson 1984, 129) for Rwandans in the post-genocide period. In this respect, the adaptation of the *Gacaca* law to the prevailing conditions and context should include more people from the community to take decisions on genocide cases. This provision makes the modern *Gacaca* law differ from the modern legal system where decisions are taken by one judge or two. The missing link (background information) is provided in square brackets at the beginning of the translated texts in both French and English (Table 5.2).

Table 5.2. Original source text with my proposed translations of Article 8 (Modified and completed by *Organic Law n° 10/2007 of 01/03/2007*, *Official Gazette n° 5 of March 1, 2007*)

Kinyarwanda	French	English
Buri <i>Nteko</i> y’Urukiko Gacaca igizwe n’abantu icyenda (9) <i>b’inyangamugayo</i> , kandi ikagira abasimbura batanu (5).	[Pour s’adapter aux conditions de la période après le génocide et assurer la collégialité dans la prise de décisions comme c’était le cas dans la tradition rwandaise] , chaque Siège de la Juridiction Gacaca est composé de neuf (9) <i>inyangamugayo</i> et dispose de cinq (5) remplaçants.	[To adjust to the post-genocide conditions and to ensure collegiality in decision making as was the case in the Rwandan tradition] , each Bench of Gacaca court is made up of 9 <i>inyangamugayo</i> with 5 substitutes.

Aspect 2. Procedure of Choosing and Appointing *Gacaca* Judges

Gacaca judges are chosen following some procedures, which are presented in Table 5.3 in the three languages.

Table 5.3. Original version of Article 14.1

Kinyarwanda	French	English
Abagize inteko z’Inkiko Gacaca ni Abanyarwanda b’inyangamugayo batowe n’Inama Rusange z’Utugari batuyemo.	Les membres des sièges des Juridictions Gacaca sont des Rwandais intègres élus par les Assemblées Générales des Cellules dans lesquelles ils résident.	Members of Gacaca Courts benches are Rwandans of integrity elected by General Assemblies for their Cells of residence.

This article determines the procedure of choosing and appointing the *Gacaca* judges *inyangamugayo*. Traditionally, no foreigner could intervene in settling legal cases between Rwandans. At least until the arrival of colonisers, and with the cooperation of other countries, justice could only

involve the Rwandan community members. The selection of *inyangamugayo* was an impromptu excise without any determined procedure or any official appointing body. Whenever a case arose, any injured party could file its case towards any *inyangamugayo* from its family, who would convene other *inyangamugayo* from the concerned families. The procedure is quite different from that of the modern system where precise procedures are established to determine the recruitment and appointment of judges. The problem that arose in the translation of this provision lies in transferring the meaning of this traditional way of selecting *inyangamugayo* into the target systems whose procedures are quite different.

To solve this translational problem, this study relies on the views from the selected respondents. In this connection, the lawyer from MINIJUST admits that, even today, judges in the Rwandan courts are nationals with very few exceptions of foreign expatriates who are resorted to for special purposes:

Même dans les juridictions de droit commun, les juges sont des personnes de nationalité rwandaise. Seulement, ils ne sont pas élus, mais recrutés par le Conseil Supérieur de la Magistrature après un concours. Mais actuellement, il y a tendance à ce que les juges étrangers soient sollicités pour épauler les nationaux [Field data].

[Even in other Rwandan ordinary courts, judges are Rwandan nationals. However, they are not elected. They are instead appointed by the Superior Council of the Judiciary after a recruitment test. Today, foreign judges are resorted to in order to support nationals].

All respondents with a legal background specified that currently judges are appointed by the Superior Council of the Judiciary after passing a recruitment test. This is quite different from the way *inyangamugayo* were selected either in the traditional *Gacaca* system or in the modern one. One human right activist argued: “the [*inyangamugayo*] were not elected and the *Gacaca* court jurisdiction was not based on Rwanda’s administrative structures”. Another respondent indicated: “families made up a committee according to the density of the population”. As one *Gacaca* legal advisor noted, the *Gacaca* court competence was restricted to the family: “There were no cells but the cases were heard at family and *chefferie* levels¹”. According to the explanation from the CNLG respondent, the selection of *inyangamugayo* in the modern *Gacaca* respected a special procedure: “All people in a given local administrative unit were asked to elect from the community a member whom they thought could fulfil the qualities of *inyangamugayo*. As neighbours, they knew each other. They knew who was involved in genocide and who was not”. As was unanimously admitted by all the respondents in the traditional *Gacaca*, *inyangamugayo* were chosen and consensually agreed upon by heads of families in the community to help in settling cases. According to one respondent from the group of historians, due to the socio-cultural context of Rwanda during the

period after genocide, there was no other option but to adapt the procedure in this way and apply it to the modern *Gacaca*. Considering all the above views, I find that the translation of this provision on the selection and appointment of *inyangamugayo* should therefore take into account the differences between the three legal systems (i.e. traditional *Gacaca*, modern *Gacaca* and statute law). This would result in the use of a more general term that is “choice” instead of using the term “election” that implies procedures of modernity. It is also important to differentiate between the terms ‘Rwandans’ which refers to the natives, citizens or inhabitants of Rwanda collectively, and ‘Rwandan nationals’ which means people of Rwandan nationality (see Table 5.4). Furthermore, in order to give more background to the target readership, the translation of the phrase *abagize inteko rusange* should adopt a more specific point of view by using the phrase “members of the entire community” instead of the term “general assembly” which does not reflect the reality of the *Gacaca* law. All these solutions show how, the modern *Gacaca* language contains within itself the “boundless potential of discovery and of re-compositions of reality” (Steiner 1998, xiv).

Table 5.4. Original source text with my proposed translations of Article 14§1

Kinyarwanda	French	English
Abagize inteko z’Inkiko Gacaca ni Abanyarwanda b’inyangamugayo batowe n’Inama Rusange z’Utugari batuyemo.	Les <i>inyangamugayo</i> des Juridictions <i>Gacaca</i> sont des personnes de nationalité rwandaise sélectionnées par les membres de la communauté au niveau de leurs Cellules de résidence.	The <i>inyangamugayo</i> of Gacaca courts are persons of Rwandan nationality selected by community members in their Cells of residence.

Aspect 3: Competence of *Gacaca* Courts

The competence of *Gacaca* courts is stated in table 5.5 in the three languages.

Table 5.5. Original version of Article 39§1

Kinyarwanda	French	English
Inkiko Gacaca zifite ububasha bw'Inkiko zisanzwe bwo gucira imanza abakurikiranyweho ibyaha, zishingiye ku buhamya bw'abashinja n'abashinjura, n'ibindi bimenyetso byatangwa. Zishobora:	Les Juridictions Gacaca exercent des compétences dont disposent les tribunaux pénaux ordinaires pour juger les prévenus sur base des témoins à charge et à décharge et d'autres preuves qui seraient déposées. Elles peuvent:	<i>Gacaca</i> Courts have competences similar to those of ordinary courts, to try the accused persons, on the basis of testimonies against or for, and other evidences that may be provided. They may in particular:
1° guhamagara umuntu uwo ari wese mu rubanza;	1° assigner n'importe quelle personne à comparaître;	1° summon any person to appear in a trial ;
2° gutegeka no gukora isaka ry'ushinjwa. Iryo saka rigomba kubahiriza umutungo w'ushinjwa n'uburenganzira bwa muntu; [...]	2° ordonner et procéder à la perquisition du prévenu. Cette perquisition doit toutefois respecter la propriété privée du prévenu et les droits de la personne humaine; [...]	2° order and carry out a search of or to the defendant's. This search must, however, respect the defendant's private property and basic human rights; [...]

The problem embedded in this provision is how to render into the target languages the special competence of the modern *Gacaca* courts, which includes, among others, summoning any person to appear in a trial either as a witness or a party in the court. These exceptional powers were inspired by the traditional *Gacaca*, and are far beyond those entrusted to a court governed by statute law. In this connection, varied data were collected to have more background information on this issue of the *Gacaca* court competence. Quite a number of interviewed respondents (lawyers and advocates) replied that the *Gacaca* courts are endowed with extraordinary powers of jurisdiction. This is different from ordinary statute law courts which cannot prosecute high state officials with immunity, for example. As one respondent (legal advisor) from NGSJ clarified, in the traditional *Gacaca*, “any resourceful person with some important information could be called upon”.

From the above observation, out of moral obligation, people who had some facts were usually willing to tell the truth. According to another respondent (lawyer), only the Court of appeal is given this special power:

C'est un pouvoir spécial dont dispose aussi les juges dans les juridictions ordinaires d'appel. Toute personne qui peut éclairer la juridiction a l'obligation de comparaître en justice, et ceci sous peines de sanction.

[This is a special power which judges from ordinary statute law courts of appeal also have. Any person who can provide some clarification to the court is obliged to appear. Failure to do so, he/she is punished].

As many respondents concurred, even traditionally, no one could be exempted from legal liability. A respondent from the group of elders admitted that even the *Abatware* 'Chiefs' could be prosecuted and tried in *Gacaca* for their wrong deeds. One interesting example he added was that of King Mutara Rudahigwa who often paid surprise visits to such courts to deter big officials from disrespecting summons from the *Gacaca* courts. Chiefs were heard and judged irrespective of their social or political position. According to the group of the *Gacaca* judges, every member of the community was heard attentively, even when s/he was accusing an important person; everyone was under the obligation to respond to the *Gacaca* court summons. The group added that nobody was barred from attending court procedures or giving an opinion. The group of historians and sociologists commended the relevance of this *Gacaca* provision and confirmed that it was a good idea to adapt it to the modern *Gacaca*.

Another peculiarity about *Gacaca* is the power to issue a search warrant for the accused as stated in point No. 2 of this provision. Nonetheless, the legal experts interviewed in this study pointed out some confusion in the provision. In the target texts presented above, it is not clear whether the search should be conducted on the body of the accused or in his/her premises. In any case, it is not easy to tell, for though the *Gacaca* hearings were conducted almost 10 years after the offences had been committed, some people were still wearing garments they had looted from their victims. Furthermore, according to many lawyers who participated in this study, in the statute law system, no court has the power to issue such warrants except the Public Prosecutor.

Considering such diverging comments on this special competence of the *Gacaca* courts, in the translation of this provision, it would be better to resort to a technique that combines both tradition and modernity to be much more explicit on how the system works. This can be achieved by considering all the aspects of the phrase 'to appear before a court': one can be subpoenaed to appear either as a witness or a party in the court. This would help to show clearly how the concept of immunity is quite modern in Rwanda. Traditionally, nobody could benefit from anything like this in anyway unless s/he was pardoned by the king. This pardon could only be granted after the culprit had been judged and served part of his sentence. In general, all this sheds some light on the special powers enjoyed by the traditional *Gacaca* which were borrowed by the modern system. These include, among others, summoning anybody regardless of his position in society and ordering any kind of search for stolen property. Moreover, for more accuracy, the adjective 'basic' used to qualify the expression 'human rights' in the English translation should be removed for it is an addition that is not implied in the Kinyarwanda version.

As a solution to the problem identified in this provision, the translator should understand the special competence of the traditional *Gacaca* courts. In fact, to espouse the view of Thompson (1984, 129), I find that these special powers “represent necessary conditions for the persistence of social life” in the Rwandan community. More specifically, one of these powers (summoning any party concerned in a given case) was adopted by the modern *Gacaca* to handle cases of the 1994 genocide cases in which a significant number of persons holding higher social positions had been involved. Relevant background information on this special competence of the *Gacaca* courts is provided below in square brackets (Table 5.6).

Table 5.6. Original source text with my proposed translations of Article 39§1

Kinyarwanda	French	English
Inkiko Gacaca zifite ububasha bw'Inkiko zisanzwe bwo gucira imanza abakurikiranyweho ibyaha, zishingiye ku buhamya bw'abashinja n'abashinjura, n'ibindi bimenyetso byatangwa. Zishobora :	[Comme c'était l'usage dans le Gacaca traditionnel,] les Juridictions Gacaca [modernes] exercent des compétences dont disposent les tribunaux pénaux classiques pour juger les prévenus sur base des témoins à charge et à décharge et d'autres preuves qui seraient déposées. Elles peuvent ainsi :	[As was the practice in the traditional Gacaca, the modern] Gacaca Courts have competence similar to those of contemporary statute law courts, to try the accused person, on the basis of testimonies against or for, and other evidence that may be provided.
1° guhamagara umuntu uwo ari wese mu rubanza;	1° assigner n'importe quelle personne à comparaître comme témoin ou partie en cause;	They may therefore : 1° summon any person to appear either as a witness or a party in the court;
2° gutegeka no gukora isaka ry'ushinjwa. Iryo saka rigomba kubahiriza umutungo w'ushinjwa n'uburenganzira bwa muntu; [...]	2° ordonner et procéder à la perquisition corporelle ou des lieux du prévenu. Cette perquisition doit toutefois respecter la propriété privée du prévenu et les droits de la personne humaine; [...]	2° order and carry out a search of the defendant's body or premises . This search must, however, respect the defendant's private property and human rights; [...]

Theme 2: Modern Legal Elements Incorporated in the *Gacaca* Law

Aspect 1: Criteria to be selected as *inyangamugayo*

To be selected, *inyangamugayo* had to meet a number of criteria that are specified in Table 5.7.

Table 5.7. Original version of Article 14§3 (Modified and completed Organic Law n° 10/2007 of 01/03/2007, *Official Gazette* n° 5 of March 1, 2007)

Kinyarwanda	French	English
Umuntu wese w'inyangamugayo ufite nibura imyaka makumyabiri n'umwe (21) kandi utazitiwe n'iri Tegeko Ngenga, ashobora gutorerwa kujya mu nzego z'Inkiko Gacaca [...]	Toute personne intègre, âgé de vingt un (21) ans au moins et remplissant toutes les conditions exigées par la présente loi organique, peut être élue membre des organes des Juridictions Gacaca, [...]	Any person of integrity who is at least 21 years old and meeting all the conditions required by this organic law, can be elected a member of the organ for a Gacaca Court [...]

The aspect of age constitutes a serious problem in the translation of this provision that sets age as one of the main criteria for someone to be selected as *inyangamugayo*. This activity requires the translator to reconcile the traditional and modern *Gacaca* whose socio-cultural conceptualisation on this issue is very different. As people did not know how to count, the concept of age was not viewed in terms of the quantifiable years someone had lived. Age was assigned to a person considering different stages of human development: infancy, youth, adulthood and old age. In most cases, depending on other conditions, namely social status, the age of maturity could overrun the adulthood and old age stages.

This and many other differences in the way the traditional and modern Rwandan societies conceived ages were raised by the majority of the respondents. Throughout the interviews, a number of respondents from the cohort of anthropologists, historians, elders and even the modern *inyangamugayo* themselves criticised the age criteria (21 years) as one of the preconditions to recruit the *Gacaca* judges. In their view, the traditional *inyangamugayo* were not formally elected as in the modern *Gacaca*. The status of *inyangamugayo* did not come about as a result of an election, but instead, it was the inner part of somebody's personality which was manifested in the way he behaved in the society. As pointed out by many respondents, at 21 years of age, someone was too young to acquire the status of *inyangamugayo*. To explain this, one lawyer said:

En droit positif également la majorité civile est fixée à 21ans. Mais pour être 'inyangamugayo' dans le droit coutumier, il fallait être beaucoup plus âgé pour bénéficier de ce titre. [In the statute law, the age of majority is fixed at 21 years. But in the traditional law, to acquire the title of inyangamugayo, one needed to be much older than 21 years].

In fact, the issue of age was deemed inseparable from the concept of *inyangamugayo*. Thus, the modern way of selecting *inyangamugayo* is different from the way it was done in the past. It was even different from the statute law procedure of appointing judges as the lawyer from MINIJUST clearly indicated:

Ceci est aussi un moyen de recrutement qui est propre aux juridictions Gacaca. Les inyangamugayo sont élus par toute la population. Les juges des juridictions ordinaires sont recrutés après un test de recrutement (sauf les juges de la Cour Suprême) et les meilleurs sont retenus. [Field data].

[This is a means of recruitment that is specific to the Gacaca courts. *Inyangamugayo* are selected by the entire population whereas judges of other statute law courts are recruited following a recruitment test (except judges of the Supreme Court) and only the most successful ones are retained].

Still on the issue of age, another respondent reacted: “internationally, age is an important issue, but maturity/ experience would have been a better criterion. Even in the modern Rwandan *Gacaca* Courts, during the General Assembly election procedures, age is a determining factor. A candidate of forty years of age could probably win over one of 24”. However, a few respondents, especially those from the group of the modern *inyangamugayo* admitted that 21 years are enough for one to qualify as a member of the modern *Gacaca*. In their argument, all respondents acknowledged that the age criterion was set at 21 years to meet several socio-cultural conditions and challenges of the period after the 1994 genocide. Many people had died and a significant number of the population had fled the country or had allegedly participated in the genocide. Thus, there was no other option but to soften some conditions to be selected as *inyangamugayo*.

In translating this aspect of age and the selection of *inyangamugayo* by the population, it is better to apply the socio-cultural approach. This can be achieved by reconciling both tradition and modernity while reconsidering the post-genocide situation. This issue of criteria is part of the “conventions” that were respected among the Rwandan society. In fact these are rules that belong to the notion of “extralinguistic context” developed by Alcaraz and Hughes (2002, 37).

In the same vein, it is also important to point to the contradiction and redundancy implied in the provision where the sentence starts with *umuntu wese w'inyangamugayo* meaning that he/she is already *inyangamugayo* and thus supposedly fulfils all the conditions to be called *inyangamugayo*. Hence, there is no need to use the terms *inyagamugayo*, *intègre* and ‘*integrity*’ at the beginning of the provision to qualify the word ‘person’ as was done in the translated versions. If someone is already *inyangamugayo*, there are no other additional conditions he is required to fulfil. As explained above, either one is *inyangamugayo* or he is not, in which case therefore there is no middle way in this concept. In this respect, to be neutral, the term *inyangamugayo* should be rendered with ‘any person’ irrespective of one’s gender. As was admitted by my respondents (mostly elders and historians), this reflects the gender-balanced approach of *Gacaca* courts whose panels of judges have always included indiscriminately both men and women. The translation that applies the socio-cultural approach to

handle this issue of age, and all the above proposed corrections are provided in Table 5.8.

Table 5.8. Original source text with my proposed translations of Article 14§3 (Modified and completed Organic Law *n° 10/2007 of 01/03/2007, Official Gazette n° 5 of March 1, 2007*)

Kinyarwanda	French	English
Umuntu wese w'inyangamugayo ufite nibura imyaka makumyabiri n'umwe (21) kandi utazitiwe n'iri Tegeko Ngenga, ashobora gutorerwa kujya mu nzego z'Inkiko Gacaca nta vangura iryo ari ryo ryose ryaba rishingiye ku gitsina, inkomoko, idini, ibitekerezo cyangwa imisumbanire y'imibereho y'abantu.	[Suite aux défis de la période après le génocide], toute personne âgée de vingt et un (21) ans au moins et remplissant toutes les conditions exigées par la présente loi organique, peut être choisie par la communauté comme membre des organes des Juridictions Gacaca, sans discrimination aucune notamment de sexe, d'origine, de religion, d'opinion ou de position sociale.	[Due to challenges of the period after genocide], any person who is at least 21 years old and who fulfils all the conditions required by this organic law, can be chosen by the community as a member of the organs for Gacaca Courts without any discrimination, such as that based on sex, origin, religion, opinion or social position.

In the rendition of this provision into French and English, the translator faced the problem of reconciling the tradition and modernity which could help in the understanding what the modern *Gacaca* meant by the use of the concept 'legal experts'. As stipulated in this article, whenever deemed necessary, the *Gacaca* courts can seek legal advice from lawyers. This is a modern aspect that was conceptualised differently in the traditional Rwandan society where expertise in *Gacaca* was not a result of formal training in legal matters.

Like in the vast majority of African countries, it is a matter of fact, there was no formal education in Rwanda before its colonisation. Thus, there were no persons formally trained in law at all. Except for those who had attended *itorero* (traditional cultural academy where people could learn different forms of values), *inyangamugayo* did not get any formal training in law. This was the case in the process of choosing *inyangamugayo* in the modern *Gacaca*. According to the respondents representing the group of elders, the traditional *inyangamugayo* were better at law than modern ones: "*abiru* were legal experts who could keep secrets; they helped in the transmission of the law", one of elders noted. The *abiru* ritualists of the king could also be consulted in case of more complex cases. Another respondent noted that expertise in law could be acquired with age and experience. Other respondents added that the more experienced the

inyangamugayo was, the more competent he could be to handle complicated cases.

Aspect 2: Consultation of Experts in Statute Law

Modern *Gacaca* judges are allowed to consult legal experts in statute law (Table 5.9).

Table 5.9. Original Version of Article 26

Kinyarwanda	French	English
Igihe cyose zisanze ari ngombwa, Inkiko Gacaca zishobora kwiambaza impuguke mu byerekeye amategeko , zagenwe n'Urwego rw'Igihugu rushinzwe gukurikirana, kugenzura no guhuza ibikorwa by'Inkiko Gacaca.	Chaque fois qu'elles en ressentent le besoin, les Juridictions Gacaca peuvent s'assurer du concours de conseillers juridiques désignés par le Service National chargé du suivi, de la supervision et de la coordination des activités des Juridictions Gacaca.	Whenever need be, Gacaca Courts seek assistance from legal experts appointed by the National Service in charge of the follow up, supervision and coordination of the activities of Gacaca Courts.

All the foregoing accounts by the respondents show that there is a big gap between the traditional *inyangamugayo* and modern ones as far as legal knowledge is concerned. What is more understandable for the contemporary reader of this provision is that, as members of the modern society, the modern *inyangamugayo* are not necessarily required to pass through any formal training in law. At the very least, they do not even have to attend *itorero* as those of the traditional *Gacaca*. According to some respondents (lawyers), this is why, the provision allows for experts in law to support *inyangamugayo* in the *Gacaca* process. As the lawyer from MINIJUST indicated, the same procedure is resorted to even today in what he referred to as “ordinary procedure”:

Ce procédé est aussi utilisé dans la procédure ordinaire. Il est basé sur l'idée qu'un juge ne peut avoir des connaissances dans tous les domaines. Donc, lorsqu'il est devant un cas qui nécessite des connaissances techniques, il lui est permis de se chercher un expert pour l'éclairer. Ici, la loi garantit aux inyangamugayo le droit de se faire aider par une personne ayant des connaissances en droit, parce que, eux aussi, n'ont pas de connaissances suffisantes en ce domaine [Field data].

[This procedure of consulting legal experts is also used in the statute law. The rationale behind this procedure is that a judge cannot have knowledge in all domains. Therefore, when the judge is confronted with a case which requires some technical knowledge, he is allowed to look for an expert for some clarification. In this specific case, since they do not have enough

knowledge in the field of law, *inyangamugayo* are allowed to seek help from an expert in law].

In general, the respondents agreed that even in the past, experts were needed and consulted in the traditional *Gacaca*, but with different and enriching versions. One respondent said that some people had rich experience in matters of land disputes, others in cattle disputes, others in criminal disputes, etc. When a case became difficult to settle, these people were consulted for advice. Another respondent said that a person deemed competent in a particular field was referred to, but was not appointed in advance by administration as is the case today. The decision to appoint someone was a matter of agreement between contending families. Another respondent said that a family other than those involved could act as a third party to settle the problem. Another respondent added that the committee of judges should be constituted by knowledgeable persons in the matter of law. All the above views prove that “experts in law” were necessary in constituting the modern *Gacaca*. Similar additional reasons were given by the respondent (lawyer) from CNLG:

Experts may be needed because not all *inyangamugayo* are familiar with legal matters. At the beginning of the *Gacaca* process, experts were to be sought in the statute law courts but then, there was only one such court in a big area with several *Gacaca* Courts. It was necessary to appoint coordinators: lawyers trained in statute law.

The translation of this law therefore requires more accuracy. The modern *inyangamugayo* had limited knowledge on traditional law but needed more expertise in modern law to manage the hybrid nature of the modern *Gacaca* law. This approach follows the model by Fairclough (2003, 931–933) in his four sets of organisational issues, which include emergency, hegemony, recontextualisation and operationalisation. It is in this line we find that this legal expertise was operationalised in the modern *Gacaca* to help *inyangamugayo* develop “new ways of acting and interacting”. For more accuracy, the word *concours* used in the French translation should thus be replaced with *consulter* to avoid thinking that *inyangamugayo* may adopt a different procedure by using modern legal expertise and give up the traditional system. As shown in Table 5.10, to solve this problem, the socio-cultural approach should be applied to provide the target readership with sufficient background information on the necessity of legal expertise in the implementation process of the modern *Gacaca*.

Table 5.10. Original source text with my proposed translations of Article 26

Kinyarwanda	French	English
Igihe cyose zisanze ari ngombwa, Inkiko Gacaca zishobora kwiymbaza impuguke mu byerekeye amategeko , zagenwe n'Urwego rw'Igihugu rushinzwe gukurikirana, kugenzura no guhuza ibikorwa by'Inkiko Gacaca.	[Pour concilier les aspects de l'ancien Gacaca et du Gacaca moderne] , chaque fois qu'elles en ressentent le besoin, les Juridictions Gacaca peuvent consulter les experts en matière de droit moderne désignés par le Service National chargé du suivi, de la supervision et de la coordination des activités des Juridictions Gacaca.	[To reconcile the aspects of traditional Gacaca with those of the modern one] , if need be, Gacaca courts can consult lawyers trained in modern law appointed by the National Service in charge of the follow up, supervision and coordination of Gacaca Court activities .

Aspect 3. Quorum Required for the *Gacaca* Court at Cell level to sit

The concept of quorum has been introduced in the modern *Gacaca* system (Table 5.11)

Table 5.11. Original version of Article 18

Kinyarwanda	French	English
Inama Rusange y'Urukiko Gacaca rw'Akagari iterana ku buryo bwemewe n'amategeko iyo yitabiriwe nibura n'abantu ijana (100) mu bayigize.	L'Assemblée Générale de la Juridiction Gacaca de la Cellule ne siège valablement que si au moins cent (100) de ses membres sont présents.	The General Assembly of the Gacaca Court of the Cell only meets legitimately if at least one hundred (100) members are present.

The aspect of quorum incorporated in this article is purely a modern concept that did not exist in the traditional *Gacaca*. This modern requirement for organising meetings that was introduced in the *Gacaca* system constitutes a very serious socio-cultural problem inherent in the hybrid nature of the modern *Gacaca* law. Thus, the translator needs to throw more light on implications and relevance of this concept to the law under study and the Rwandan society after the 1994 genocide. The article fixes the quorum required for a *Gacaca* Court at Cell level to sit. As hinted in Chapter 2, the cell was the lowest administrative unit in Rwanda until the 2000 decentralisation policy. The term 'quorum' refers to a very modern concept which derives from statute law. As one respondent (lawyer) indicated, a cell consists of a minimum number of members required for any *Gacaca* decision to be valid. In this case, the assembly is the meeting of the community members at cell level:

L'Assemblée Générale de la Cellule est l'organe suprême de la Cellule qui prend souvent des décisions pouvant avoir un impact sur le déroulement des procès dans les juridictions Gacaca. Il est donc évident qu'on prévoit un nombre de gens qui doit être atteint pour tenir une réunion. Ceci se fait partout lorsqu'un organe donné se réunit pour prendre une décision. C'est le quorum exigé pour la tenue des réunions dans diverses assemblées [Field data]

The General Assembly of the cell is the highest organ which sometimes takes decisions that might have an impact on the course of the *Gacaca* court proceedings at the cell level. It is thus understandable to provide for the number of people that should be reached to hold a meeting. This is common when a given organ meets to take decisions. This is the quorum required to hold meetings in different assemblies].

Even though the size of the number does necessarily secure the impossibility of cheating, this concept of quorum limits the impact of possible corruption and external influence on the decision to be made. Given the magnitude of the Rwandan genocide, the truth could not be known without active participation of the entire community and that is why the concept of quorum was introduced to fix the minimum number of people required as a precondition for the *Gacaca* hearings. This is different from the traditional *Gacaca* where no number was required in terms of judges or the audience to hear a case. Hearings were improvised whenever a case requiring *inyangamugayo*'s attention arose, and only interested parties and their neighbours had a moral obligation to attend. Thus, the common point of consensus by all respondents is that no defined quorum existed in the traditional *Gacaca*. One respondent went a step further and reveals, "lack of a defined quorum did not impair the decisions of the bench, since generally a good number of people were selected to take valid decisions". Another respondent added that the concept of quorum was very relative and was in the hands of the community/village assembly. However, he affirmed that a minimum number was required to take valid decisions, though the former was undetermined. Otherwise, the meeting would be postponed.

However, all the respondents agreed that in the modern *Gacaca*, considering that life is politically, socially and economically difficult nowadays, there is less commitment to community matters, and without a defined quorum, people are likely to dodge meetings. This would make it difficult to have enough testimonies and hence to know the truth on how the genocide was perpetrated. The utmost aim of this law — reconciliation — would thus be compromised.

The analysis shows that the concept of quorum is a social phenomenon that has been constructed by social actors (i.e. The *Gacaca* lawmakers) to meet the current prevailing conditions. In this regard, adapting the organisational model devised by Fairclough (2003) to this provision, I find that the concept of quorum is a new "organisational discourse that emerges through

reweaving relations” between the already “existing discourse” and concept of community participation that characterised the traditional *Gacaca*. As noted, all this was done to provide an environment that would allow community members to participate in the *Gacaca* hearings and reveal the truth about what happened during genocide. As shown in Table 5.12, translating these ideas into English and French requires a combination of both traditional and modern values with the purpose of explaining the socio-cultural context of the Rwandan society as well as the 1994 genocide.

Table 5.12. Original source text with my proposed translations of Article 18

Kinyarwanda	French	English
Inama Rusange y'Urukiko Gacaca rw'Akagari iterana ku buryo bwemewe n'amategoko iyo yitabiriwe nibura n'abantu ijana (100) mu bayigize.	[Pour créer un environnement permettant de révéler la vérité sur le génocide et arriver à la réconciliation] , l'Assemblée Générale de la Juridiction Gacaca de la Cellule ne siège valablement que si au moins cent (100) de ses membres sont présents.	[To create an environment that would allow to reveal the truth about genocide and achieve reconciliation] , the General Assembly of the Gacaca Court of Cell level meets legitimately only if at least one hundred (100) members are present.

5.2 Analysis and Translation of Some Socio-cultural and Contextual Aspects

With the help of discourse analysis devices drawn mainly from Bryman (2008), Fairclough (2003) and Van Dijk (1997) and theories of ideology and culture from Thompson (1984), Lefevere (1992) and Katan (1999), the section presents society, culture and context-specific aspects judged to constitute major challenges in translating the *Gacaca* law from Kinyarwanda into English and French. In order to understand the socio-cultural dimension of the modern *Gacaca* law and to facilitate its translation into French and English, the selected areas of difficulty were organised around three main themes: (1) Some stipulations specific to the 1994 genocide in Rwanda; (2) Rwandan society and culture-specific markers; and (3) Language aspects pertaining to meaning, reality and context within the *Gacaca* law.

Theme 1: Aspects Specific to Rwandan Genocide and the Modern *Gacaca* Law

Aspect 1: Requirements to be selected as *inyangamugayo*

To be selected as *inyangamugayo*, one has to meet certain requirements (Table 5.13).

Table 5.13. Original version of Article 14§2 (Modified and completed Organic Law n° 10/2007 of 01/03/2007, Official Gazette n° 5 of March 1, 2007)

Kinyarwanda	French	English
Inyangamugayo ni umunyarwanda urangwa n'ibi bikurikira:	Est intègre, tout Rwandais remplissant les conditions suivantes:	Is a person of integrity, any Rwandan meeting the following conditions:
1° kuba ataragize uruhare muri jenoside;	1° n'avoir pas participé au génocide;	1° not to have participated in genocide ;
2° kutarangwa n'amacakubiri;	2° être exempt d'esprit de divisionnisme ;	2° to be free from the spirit of sectarianism ;
3° kuba atarakatiwe burundu igihano cy'igifungo kigeze ku mezi atandatu (6);	3° n'avoir pas été condamné par un jugement coulé en force de chose jugée à une peine d'emprisonnement de six (6) mois au moins ;	3° not to have been sentenced to a penalty of at least six (6) months of imprisonment ;
4° Kuba indakemwa mu mico no mu myifatire;	4° être de bonne conduite, vie et mœurs ;	4° to be of high morals and conduct ;
5° Kuba umunyakuri;	5° dire toujours la vérité,	5° to be truthful ;
6° Kwanga guhemuka;	6° être honnête ;	6° to be honest;
7° Kutanigana abandi ijambo;	7° être caractérisé par l'esprit de partage de la parole.	7° to be characterised by a spirit of speech sharing.

The provision under Article 14§2 establishes the selection criteria of *inyangamugayo*. As noted earlier, in the traditional *Gacaca*, *inyangamugayo* was believed to be a person with undeniable probity before anybody else in the society. However, due to the current socio-cultural conditions, it is very difficult to have someone who meets unanimously all the criteria exhibited by the traditional *inyangamugayo*. The translation of these criteria poses a very serious problem because of their specificity to the law that was drafted to meet special conditions of the post-genocide period. Thus, the translator needs to have full understanding of the rationale behind the adoption of these criteria, and help the target reader to understand the specific nature of these criteria in relation to the modern *Gacaca* law.

This provision sets out a number of conditions on which to base the selection of modern *inyangamugayo*. This selection is influenced by the modern legal system where, in the view of lawyers, being part of the public service, judges are normally recruited on the basis of criteria set by the employer: “*Ceci constitue les conditions requises pour être considéré comme inyangamugayo. Même dans la fonction publique, on met en place certains critères qui doivent servir de base à l'entité qui recrute un personnel*”. Though there are some general conditions for recruiting any

employee, the recruiting committee generally adds some other conditions that are specific to the job to be met by the successful recruit. Besides the general criteria required for any kind of job, the modern *Gacaca* sets out some other requirements that are specific to genocide and its context. According to most respondents, genocide was a new phenomenon in Rwanda, and was a result of bad politics based on divisionism among Rwanda's ethnic groups (i.e. Twa, Tutsi and Hutu). To the knowledge of many respondents, nothing similar to the 1994 genocide had ever happened anywhere in Rwanda or in Africa. This is the reason why criteria 1 and 2 were added to match the context, i.e. not having participated in genocide and sectarianism matters. It is also important to point out the mismatch between the ST and the TTs in what regards the limitation of period of sentence in criterion No. 3. The Kinyarwanda version limits the condition of the period of imprisonment to less than 6 months whereas the French and English translations limit it to at least 6 months. This seems to be an oversight by the *Gacaca* law drafters who did not grasp the effect of the use of the negation with the phrase *kuba atarakatiwe* (not having been sentenced) used with *kigeze* (reaching) instead of *kirenze* that means "exceeding". In the translation of this discrepancy in the two versions, there is a need to consider the period of imprisonment that cannot prevent a person to have a clean police record. This period should not normally exceed 6 months and the translator sensed the error in the source text and successfully rendered into the target languages what is supposed to be the reality. This is one of the very few attempts that the translator made to match the contextual approach that has been adopted for the purpose of this study. According to all respondents, the above criteria were relevant in selecting *inyangamugayo* in the modern *Gacaca*. These criteria were appropriate for a judicial system like *Gacaca* meant to reconcile Rwandans. In this regard, the drafting and translation of these special conditions should take into consideration the nature of the crime committed as well as its context. These "conditions" are established "for the persistence of social life" (Thompson 1984, 129) for Rwandans during the post-genocide period. In the view of Katan (1999, 39) these are "values and beliefs" which are "determined by the type of person, organisation or culture in that particular context". Thus, *inyangamugayo* selection criteria, as provided for in Article 14, contribute to the shaping of the Rwandan society, reality and identity. The specificity of this provision is catered for as follows in the suggested translation of Table 5.14.

Table 5.14. Original source text with my proposed translations of Article 14§2 (Modified and completed Organic Law *n° 10/2007 of 01/03/2007, Official Gazette n° 5 of March 1, 2007*)

Kinyarwanda	French	English
Inyangamugayo ni umunyarwanda urangwa n'ibi bikurikira: 1° kuba ataragize uruhare muri jenocide; 2° kutarangwa n'amacakubiri; 3° kuba atarakatiwe burundu igihano cy'igifungo kigeze ku mezi atandatu (6); 4° kuba indakemwa mu mico no mu myifatire; 5° kuba umunyakuri; 6° Kwanga guhemuka; [...] 	[Considérant le caractère spécial des infractions commises pendant le génocide et les conditions socioculturelles actuelles,] est inyangamugayo moderne, toute personne de nationalité rwandaise remplissant les conditions suivantes : 1° n'avoir pas participé au génocide ; 2° être exempt d'esprit de divisionnisme ; 3° n'avoir pas été condamné par un jugement coulé en force de chose jugée à une peine d'emprisonnement de six (6) mois au moins ; 4° être de bonne conduite, vie et mœurs ; 5° dire toujours la vérité ; 6° être honnête ; [...] 	[Considering the special nature of the offences committed during genocide and the current socio-cultural conditions,] the modern inyangamugayo is any Rwandan national fulfilling the following criteria: 1° Not to have participated in the genocide; 2° to be free from the spirit of divisionism; 3° not to have been sentenced to a penalty of at least six (6) months of imprisonment; 4° to be of high morals and conduct; 5° to be truthful; 6° to be honest; [...]

Aspect 2. Categorisation of Litigants

Genocide suspects were categorised into three main categories as described in the three languages (Table 5.15).

Table 5.15. Original version of Article 2 (See also categorisation in Article 51)
(Modified and completed by Organic Law No 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Abantu bakurikiranyweho kuba barakoze cyangwa barafatanije gukora ibyaha bituma bashyirwa mu rwego rwa kabiri n'urwa gatatu nk'uko bisobanuye mu ngingo ya 51 y'iri Tegeko Ngenga, baburanishwa n'Inkiko Gacaca ziteganyijwe mu nteruro ya II y'iri Tegeko Ngenga. Inkiko Gacaca zikurikiza ingingo zikubiye muri iri Tegeko Ngenga.	Les personnes que les actes commis ou les actes de participation criminelle rangent dans les 2 ème et 3 ème catégories telles que définies par l'article 51 de la présente loi organique sont justiciables des Juridictions Gacaca tel que prévu par le titre II de la présente loi organique. Les Juridictions Gacaca appliquent les dispositions de la présente loi organique.	Persons or their accomplices prosecuted for their participation in criminal acts that put them in categories 2 and 3, as defined by article 51 of this organic law, are answerable to Gacaca Jurisdictions referred to in Title II of this organic law. Gacaca courts apply the provisions of this organic law.
Abantu bakurikiranyweho kuba barakoze ibyaha bituma bashyirwa mu rwego rwa mbere nk'uko bisobanuye mu ngingo ya 51 y'iri Tegeko Ngenga , baburanishwa n'inkiko zisanzwe, zikurikiza amategeko asanzwe agenga iburanisha , haseguriwe ibyihariye biteganywa n'iri Tegeko Ngenga.	Les personnes relevant de la première catégorie telles que définies par l'article 51 de la présente loi organique sont justiciables des juridictions ordinaires qui appliquent les règles de procédure de droit commun , sous réserve des exceptions prévues par la présente loi organique.	Persons who, by the virtue of acts committed, rank in the first category, as defined in Article 51 of this organic law , are tried before to ordinary courts which apply the common law content and procedure rules subject to exceptions provided for by this organic law.

The article on the categorisation of the litigants has been availed in the three languages (Table 5.15). The article provides for categorisation of genocide suspects into three categories (ranging from genocide planners and killers to looters) corresponding to the offences they committed during the genocide. In addition, it assigns to each of these categories, a type of court that is entitled to judge them. The problem arising in the translation of the above provision is that this categorisation did not exist in the traditional *Gacaca*. As explained in Chapter three, the statute law system classifies crimes instead of people who are suspected of committing those crimes. For example, the English law identifies summary offences from indictable ones, and each of these categories is assigned its special mode of trial. This example shows how this provision is specific to the modern *Gacaca*, and in the translation of this law, this specificity should not be ignored.

According to the majority of respondents, the traditional *Gacaca* did not have any system of categorising offences or their corresponding courts to handle them. In the view of the lawyer from MINIJUST, this is inherent in the multifunctional nature of the traditional *Gacaca* courts: “*L’ancien Gacaca avait la compétence de connaître et trancher toutes les affaires qui lui avaient été soumises sans distinction aucune*” [The traditional *Gacaca* had the competence to investigate and judge all submitted cases without any distinction]. This is different from Rwanda’s modern legal structure which classifies offences and refers them to different courts depending on their competence. This categorisation follows the civil law system that identifies offences by their degree of seriousness.

The structure of Rwandan courts is provided for in Art. 143 of the Rwandan Constitution of 2003 which recognises two main types of courts: ordinary and specialised courts. However, as one lawyer explained, though military courts apply ordinary law, they fall under specialised courts: “*‘Inkiko zisanzwe’ ordinaires en français, n’incluent pas les juridictions militaires qui sont des juridictions spécialisées ‘inkiko zihariye’*” [Ordinary courts in French do not include military courts which fall under the category of specialised courts]. What is not easy to understand about this court structure is that, as explained in the above lawyer’s statement, even the *Gacaca* Courts are included in specialised courts². If the label ‘special’ is deemed to be the opposite of ‘ordinary’, then qualifying *Gacaca* as special in the Rwandan context seems extremely ungrounded. The *Gacaca* courts are products of Rwanda’s traditional legal system. They cannot be described therefore as extraordinary since they are used in the Rwandan context. However, this results from the quasi-dormant status of *Gacaca* vis-à-vis the Rwandan legal system due to the imposition of the coloniser’s legal system for a long period. Though Chapter two refers to the co-existence of these two systems, in actual fact, it was found out that in most countries which went through the same experience as Rwanda, indigenous law was seriously undermined to the extent that it even became extinct.

Even though most respondents confirmed that the system of categorising offences and offenders did not exist in the traditional *Gacaca*, some respondents (historians, elders, HRO officials) nonetheless attested its existence. In their view, the criteria used were not the same. They specified that this categorisation was only restricted to two levels. One category was that of cases where severe crimes were handled by official administration (chiefs and the king). Another category was that of common offences handled by Committees of Judges at village level. The principal objective of these instances was to correct and reconcile community members. On the basis of the observation made by *inyangamugayo* who implemented the modern *Gacaca* law, the way of categorising suspects can only be applicable to the context of the genocide. In their view, this law established categories that reflected the gravity of offence. It served as a facilitating factor for the modern *inyangamugayo* who were not law specialists. This facility is manifested by the punishments which are clearly proportional to

offences. Another justification for this provision was made by another respondent (NSGJ Legal Adviser): “since genocide was a terrible offence, special provisions had to be put in place and adopted to suit the modern *Gacaca* Courts”. An advocate strongly criticised this provision on the account that it violated the ‘principle of presumption of innocence’ which is central to the modern and international law principles:

Ce sont les catégories fixées par la loi suivant la gravité des faits dont on est accusé. Toutefois, mettre quelqu'un dans une catégorie avant qu'il soit jugé équivaudrait en fait à lui imputer les faits dont il est accusés avant même le jugement; ce qui est contraire au principe de présomption d'innocence [Field data].

These are categories set out by the law following the seriousness of charges. However, placing persons in a category before they are judged is tantamount to imputing to them charges that they are accused of even before judgement. Hence, this violates the principle of presumption of innocence].

Nonetheless, one respondent from LIPRODHOR acknowledged the existence of such categorisation in statute law because cases are handled depending on the competence of the court to try that particular case (from inter-mediate courts, high instance courts, and up to the Supreme Court). In any case, it is obvious that the modern legal system does not classify offenders before passing judgement. However, this system classifies offences depending on the level of gravity and determines court structures which are competent to handle them. In any case, categorisation of suspects basing on offences contradicts the principle of the traditional *Gacaca* according to which justice was a community-based affair, whereby members shared responsibility on any committed offence. In an attempt to accommodate tradition and modernity, the modern *Gacaca* determined individual responsibilities during genocide. In addition, all the community members were duty-bound to participate in the *Gacaca* process.

In this regard therefore, the translation of the provision on litigants' categorisation should consider the difference existing between the traditional and modern legal systems in terms of offence categorisation and court structure. The categorisation of litigants is a special aspect that was introduced to adjust to the prevailing context and reality in order to achieve the main aim of the modern *Gacaca* law, that is, reconciliation. It is a solution that is supported by the theory of situation-in-culture developed by (Nord, 1997: 1). In Nord's view, situations are not universal but are embedded in a cultural habit or in given situations. In effect, the categorisation that is based on suspects instead of on crimes was conditioned by the special situation of the genocide. More precisely, the special categorisation provided in the modern *Gacaca* is considered as a “social reality” that has a “specific meaning and relevance structure” (Schutz quoted by Bryman 2008, 1) for Rwandans who live, act and think within the context and reality of genocide. All this background information

was provided in square brackets in order to shed more light on the reality and context that prevailed during and after genocide (see Table 5.16).

Table 5.16. Original source text with my proposed translations of Article 2 (See also categorisation in Article 51) (Modified and completed by Organic Law No 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Abantu bakurikiranyweho kuba barakoze cyangwa barafatanije gukora ibyaha bituma bashyirwa mu rwego rwa kabiri n'urwa gatafu nk'uko bisobanuye mu ngingo ya 51 y'iri Tegeko Ngenga, baburanishwa n'Inkiko Gacaca ziteganyijwe mu nteruro ya II y'iri Tegeko Ngenga. Inkiko Gacaca zikurikiza ingingo zikubiye muri iri Tegeko Ngenga.	[Sans faire préjudice à l'objectif principal du Gacaca, cette loi organique détermine les responsabilités individuelles dans le génocide. Ainsi,] les personnes que les actes commis ou les actes de participation criminelle rangent dans les 2 ^{ème} et 3 ^{ème} catégories telles que définies par l'article 51 de la présente loi organique sont justiciables des Juridictions Gacaca tel que prévu par le titre II de la présente loi organique. Les Juridictions Gacaca appliquent les dispositions de la présente loi organique.	[Without prejudice to the main objective of traditional Gacaca, this Organic Law determines individual responsibilities within genocide. Thus], persons or their accomplices prosecuted for their participation in criminal acts that put them in categories 2 and 3, as defined by article 51 of this organic law, are subject to trial in Gacaca Jurisdictions referred to in Title II of this organic law. Gacaca courts apply the provisions of this organic law.
Abantu bakurikiranyweho kuba barakoze ibyaha bituma bashyirwa mu rwego rwa mbere nk'uko bisobanuye mu ngingo ya 51 y'iri Tegeko Ngenga, baburanishwa n'inkiko zisanzwe, zikurikiza amategeko asanzwe agenga iburanisha, haseguriwe ibyihariye biteganywa n'iri Tegeko Ngenga.	Les personnes relevant de la première catégorie telles que définies par l'article 51 de la présente loi organique sont justiciables des juridictions ordinaires qui appliquent les règles de procédure de droit commun, sous réserve des exceptions prévues par la présente loi organique.	Persons who, by the virtue of acts committed, rank in the first category, as defined in Article 51 of this organic law, are tried before ordinary courts which apply statute law content and procedure rules subject to exceptions provided for by this organic law.

Aspect 3: Community Service and Suspended Sentences

Table 5.17. presents the tri-lingual versions of the provision on community service and suspended sentences.

Table 5.17. Original version of Article 74 (Modified and completed by Organic law No. 13/2008 of May 19, 2008)

Kinyarwanda	French	English
Umuntu uri mu gihano nsimburagifungo cy'imirimo ifitiye igihugu akamaro , iyo akoze ikindi cyaha, igihe yari amaze muri iyo mirimo kiba impfabusa, agasubira muri gereza kurangiza igihe cy'igifungo yari asigaje, kandi akanakurikiranwa ku cyaha gishya yakoze.	Si le condamné à une peine d'emprisonnement avec commutation de la peine en travaux d'intérêt général se rend coupable d'une autre infraction, le sursis équivalent à toute la période de ces travaux encourus cesse d'être considéré et il rentre dans la prison pour y passer la moitié de la peine d'emprisonnement qui reste et les poursuites sont engagées contre lui pour la nouvelle infraction.	Should a person who is serving community services sentence commit another crime, the period he or she has already served becomes void and he or she shall serve the remaining prison sentence in custody as well as be prosecuted for the new crime he or she committed.

This article specifies modalities of serving both community works and non-custodial sentences. Rendering the meaning of this provision into the target languages causes a problem. The main crux is that the provision establishes a punishment which was not known in the traditional context, and which does not belong to statute law. Thus, the translation of this provision requires full understanding of the socio-cultural context that motivated the inclusion of this special punishment into the modern *Gacaca* law. In the view of the respondents from all the selected categories, the punishment referred to as 'community work' did not exist in traditional Rwanda. It is a new phenomenon whose understanding emanates from the context of genocide, whereby many people were blindly forced to participate in the killings. This punishment was adopted to solve the numerous challenges of the 1994 genocide. These challenges include, among others, handling cases of many persons who were kept in prisons without charge or trial, and responding to many voices from the victims claiming for justice. As explained by one respondent (MINIJUST lawyer), this was an alternative punishment for imprisonment that helped to rehabilitate and reintegrate the culprit into society:

C'est une peine alternative à l'emprisonnement qui est en réalité comme une mesure qui permet au condamné de prouver qu'il peut se réhabiliter et revenir dans le droit chemin. Si justement il continue de manifester des comportements qui montrent à suffisance qu'il ne se corrige pas, il doit être écarté de la société au moyen d'internement dans une prison [Field data].

This is an alternative penalty to imprisonment which is in fact a way of allowing the convict to prove that he can be rehabilitated and reformed into the right direction. When he continues to show that his behaviour is not

improving, he must be excluded from society by means of internment in a prison].

In the views of advocate and law experts, according to Rwanda's statute law, the above punishment suspends the imprisonment sentence. In case a person does not scrupulously comply with the sentence, s/he is taken back to prison without considering the previous period of suspension. In general, the majority of the respondents extolled this innovation of the modern *Gacaca*. They agreed on the way it contributed to national unity and reconstruction. However, after a thorough reading of the three versions of this provision, one respondent (advocate) detected a mistranslation of this concept. According to him, in international law *igihano nsimbura gifungo* is normally translated in French as *travaux forcés*. In English, its equivalent term is 'force labour'. In his view, the term *travaux d'intérêt général* can easily be confused with an already existing Rwandan community participation mechanism known as *umuganda*.

Originally used to mean 'assistance', through the practice of *umuganda*, people meet on their own initiative to offer free physical labour on a public utility that is meant for public use or for supporting a needy person³. Thus, by construing some meaning from this simple definition, we find out that *umuganda* is the right word to translate the French expression *travaux d'intérêt général*, which may be literally translated in English as 'works for public interest'. The argument by Fairclough (2003, 931) on how a "new organisational discourse emerges through reweaving relations between the already existing discourses" is applicable to the phrase *imirimo nsimbura gifungo* that literally means 'works that replace imprisonment'. This is because, though the concept is used in the place of the punishment of forced labour that is well known in some other countries, in Rwanda it has been transformed and operationalised to suit the context and the main objective of the law.

The translation of the provision in Table 5.17 therefore requires acknowledging this new input into the modern *Gacaca*. The aspect constitutes as an alternative to the already existing punitive measures intended to face the challenge of a big number of genocide suspects and restore peace and reconciliation in the country. Furthermore, it should be noted that, in this case, it is the imprisonment sentence that is transformed into community work. The punishment is lesser severe than internment. In addition, the word 'custody' that was used is replaced by the word 'confinement' to make a difference from the manner in which the person sentenced to perform works of public interest is treated. The translations that include necessary background information on the punishment of community service are provided in Table 5.18.

Table 5.18. Original source text with my proposed translations of Article 74 (Modified and completed by Organic law No. 13/2008 of May 19, 2008)

Kinyarwanda	French	English
Umuntu uri mu gihano nsimburagifungo cy'imirimo ifitiye igihugu akamaro, iyo akoze ikindi cyaha, igihe yari amaze muri iyo mirimo kiba impfabusa, agasubira muri gereza kurangiza igihe cy'igifungo yari asigaje, kandi akanakurikiranwa ku cyaha gishya yakoze.	Si le condamné [à une peine de travaux d'intérêt général comme commutation de la peine d'emprisonnement] se rend coupable d'une autre infraction, le sursis équivalent à toute la période de ces travaux encourus est de nul effet et le concerné rentre dans la prison pour y purger la totalité de la peine lui infligée par la juridiction et il est puni pour la commission de la nouvelle infraction.	Should a person who [is sentenced to works for public interest as commutation of imprisonment] commits another crime, the suspended sentence equivalent to the period he or she has already served for works for public interest shall be nullified and he or she shall serve the entire sentence originally imposed in confinement and be prosecuted for the new crime he or she committed.

Theme 2: Rwandan Culture-specific Aspects

Aspect 1: Traditional Conception of *inyangamugayo*

Table 5.19 presents in the three languages the traditional conception of *inyangamugayo*.

Table 5.19. Original version of Article 14§3 (Modified and completed by Organic Law n° 10/2007 of 01/03/2007)

Kinyarwanda	French	English
Umuntu wese w' inyangamugayo ufite nibura imyaka makumyabiri n'umwe (21) kandi utazitiwe n'iri Tegeko Ngenga, ashobora gutorerwa kujya mu nzego z'Inkiko Gacaca [...].	Toute personne intègre , âgé de vingt un (21) ans au moins et remplissant toutes les conditions exigées par la présente loi organique, peut être élue membre des organes des Juridictions Gacaca, [...].	Any person of integrity who is at least 21 years old and meeting all the conditions required by this organic law, can be elected a member of the organ for a Gacaca Court [...].

Although the term *inyangamugayo* is used many times throughout the law, its detailed definition appears for the first time in Article 14. Since the beginning of this organic law, it is very difficult for a non-Rwandan audience to understand the real meaning of this concept and its historical background. The term was translated as *homme intègre* in French and 'person of integrity' in English. This is a mistranslation because the word 'integrity' that is used in both versions cannot alone express all the features

embedded in the term *inyangamugayo*. As earlier noted, the term is so semantically complex that it includes a number of aspects such as maturity, honesty, equity, trustworthiness, dependability, truthfulness, and more other high moral principles. In some other parts of the law, it was translated as ‘upright person’ or ‘honest person’. Thus, to avoid mistranslating the term and the law itself, a translator needs in-depth knowledge of Rwandan culture, especially the role and status of *inyangamugayo* in traditional Rwanda.

Though not all respondents were sure that the concept *inyangamugayo* was designated by the same word, they all noted that it was used in the traditional *Gacaca*. Only one respondent (elder) from the cohort of the modern *inyangamugayo* was sure that the concept carried the same nomenclature. Concerning the issue of qualification, all respondents consented that for a person to be accepted as *inyagamugayo* and sit on the bench, age was an important criterion. For another respondent, he cited the criterion of marriage, while another quoted a minimum age of 45 years old. The criterion of 21 years set by the modern *Gacaca* in selecting *inyangamugayo* did not correspond to the wishes of the respondents. They associated age 21 with the following epithets: immature, inexperienced, irresponsible, and therefore subjective. One respondent from the group of elders offered an analogy between the concepts of *inyangamugayo* and *umushigantahe* from Kirundi⁴ culture. Another group defined *inyangamugayo* as “any person that is morally and socially beyond reproach”. On top of this, he added some other important qualities: a married person who is elderly and enjoying real social aura. Others said that, apart from being above 45 years of age, *inyangamugayo* was expected to have a sense of responsibility, with qualities like offering voluntary service, commitment to duty and absolute care to whatever he is saying or doing. In the view of another respondent involved in implementing the modern *Gacaca*, *inyangamugayo* should have a number of attributes that would help them to deal with justice:

- A person of integrity elected by the concerned jurisdiction (whenever possible, the voting assembly would involve members of both parties);
- Objectivity;
- Authority; and
- Competence (training was organised to supplement acquaintance with modern written law), etc.

Be that as it may, a largely shared view among older respondents was that the traditional *Gacaca* courts did not concern individuals but families: “One offended a family, not an individual,” a historian stressed. Therefore, the appointment of *inyangamugayo* was made by the head of the family (litigant or accused). The features of family and shared responsibility among family members in the traditional *Gacaca* are amply corroborated in Chapter two that describes main features of Rwanda’s legal system (See

Ruhashyankiko 1977). As the chapter notes, the Rwandan customary law was community-based, and whenever a crime was committed, all community members, instead of individuals, had shared responsibilities. Concerning the organisation of the bench of *inyangamugayo*, the respondents from the group of elders indicated that it was made of representatives of both families who decided to meet at a given place, and it was co-chaired by the heads of both families. All these elements show how the translation of this concept is quite puzzling. Throughout this law, the term *inyangamugayo* was translated by the expressions *personne intègre* in French. In English however, it was translated in some provisions by 'person with integrity' while in others, it was rendered with two compound terms 'upright person' and 'honest person'. However, some respondents (lawyers and linguists) noted that rendering the term into these target languages in this way was an under-translation. One respondent (linguist) referred to the term as culture-bound and therefore semantically complex. Yet another (lawyer) explained the broadness of the meaning of the term and straightforwardly rejected the translation provided in French:

Le mot 'inyangamugayo' en Kinyarwanda est un mot très large qui combine à lui seul presque toutes les qualités de la personne humaine: intégrité, probité, sagesse, droiture, etc. Ce qui veut dire que le mot intègre ne peut pas refléter, à lui seul, le mot 'inyangamugayo'.

[The Kinyarwanda word *inyangamugayo* is a semantically complex concept that bears in itself all the qualities of a person: integrity, honesty, wisdom, righteousness, etc. This means that the word 'integrity' cannot alone express all the semantic aspects of the word *inyangamugayo*].

Another respondent (lawyer) also noted that the term is strictly culture-bound. In his view, it refers to a person with irreproachable behaviour:

L'inyangamugayo est un terme purement de la culture rwandaise. Sa traduction dans d'autres langues comme 'la personne intègre' lui fait perdre son originalité culturelle. Culturellement, le terme désigne une personne dotée de comportement et de conduite sans égal.

Inyangamugayo is a Rwandan culture-bound term. Its translation into other languages as 'a person with integrity' makes it lose its cultural originality. Culturally, it refers to a person endowed with unequalled behaviour].

Other respondents (HRO officials, lawyers and advocates) almost had a similar view on the meaning of the term. They did not admit that a 21-year old could fulfil the criteria of a traditional *inyangamugayo*. In their view, though they avoided being specific, they thought that *inyangamugayo* had to 'be older than this age'.

Considering the way most respondents understood the concept, it is more prudent to adopt a more holistic approach that combines several aspects implied by the concept. In the translation of the concept *inyangamugayo*, it is initially worthwhile to provide an extended explanation of the semantic

aspects underlying its meaning, so that the remaining part of the text should espouse its meaning in its SL form. As supported in the theory, *inyangamugayo* is a “cultural” word that is “overloaded with cultural connotations” (Newmark 1988, 94). In this way, it is advisable to adopt Newmark’s proposal of not translating it “literally”. In other words, the TL translation should keep the original word *inyangamugayo* in Kinyarwanda and accompany it with a set of aspects that it implies either in French or English as shown in Table 5.20.

Table 5. 20. Original source text with my proposed translations of Article 14§3 (Modified and completed by Organic Law n° 10/2007 of 01/03/2007)

Kinyarwanda	French	English
Umuntu wese w’inyangamugayo ufite nibura imyaka makumyabiri n’umwe (21) kandi utazitiwe n’iri Tegeko Ngenga, ashobora gutorerwa kujya mu nzego z’Inkiko Gacaca [...].	Tout <i>inyangamugayo</i> , [personne sage d’intégrité morale et sociale], âgé de vingt un (21) ans au moins et remplissant toutes les conditions exigées par la présente loi organique, peut être choisi comme membre des organes des Juridictions [...]	Any <i>inyangamugayo</i> , [wise persons with moral and social integrity,] who is at least 21 years old and meets all the conditions required by this organic law, can be chosen as a member of the organ of a Gacaca Court [...]

Aspect 2: Dismissal of *inyangamugayo* by Public Reprimand

Table 5.21 presents the trilingual version of the provision on dismissal of *inyangamugayo* by public reprimand.

Table 5.21. Original Version of Article 16§2 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Icyemezo cyo kwirukana [...] uwakuruye amacakubiri n'uwakoze igikorwa gituma atakwitwa inyangamugayo, gifatwa mu nyandiko n'abagize Inteko y'urukiko Gacaca imaze kugisha inama Inama Rusange y'Akagari akomokamo. Uwo wirukanywe agayirwa imbere y'Inama Rusange kandi ntashobora kongera gutorerwa kuba inyangamugayo.	La perte de la qualité de membre de la Juridiction Gacaca pour [...] avoir semé le divisionnisme et pour acte incompatible avec la qualité de personne intègre est décidée par écrit par les membres du Siège de la Juridiction Gacaca après consultation de l'Assemblée Générale de la Cellule de son ressort. Le membre ainsi démis fait l'objet d'un blâme devant l'Assemblée Générale et ne peut être élu au titre de personne intègre dans un quelconque organe.	The decision to dismiss a member of the organs of Gacaca Courts who [...] has instigated sectarianism or has done an activity incompatible with the quality of a person of integrity, is made in writing, by the members of the Seat for the Gacaca Court, after consultations with the General assembly of the home Cell. The member so dismissed is subject to an official warning before the General Assembly and cannot be elected again as a person of integrity.

This article sets modalities of dismissing *inyangamugayo* from his post. As stipulated, if *inyangamugayo* is dismissed, he is reprimanded in the public as a way of punishing him. The concept of public reprimand as one of the most serious punishments is specific to *Gacaca*. However, it is recognised as a minor punishment by statute law. In this regard, the main problem faced in the translation of this provision is inherent in the socio-cultural values implied in the concepts *kugayirwa imbere y'inteko* [reprimand before the panel] which is the same as *kugayirwa mu ruhame* [reprimand in the public]. Except special cases which could be heard in camera for public decency purposes, most hearings were conducted in the presence of other interested persons. Thus, to transfer accurately all the cultural aspects embedded in the punishment of public reprimand, the translator needs to understand the weight that was attached to this punishment in the traditional Rwandan society and culture.

According to lawyers, traditionally the practice of reprimanding a person in public was not limited to *inyangamugayo*. Any wrongdoer could be subject to this psychological punishment. It usually happened as a last resort since there were other mechanisms to warn and punish people who had not respected societal norms. One respondent from the above cohort noted that, with a few exceptions resulting from the current social change and foreign influence, all respectful persons feared such sanctions. Another respondent

in the same category noted that the main reason was that such reprimand in public made him lose his reputation in the community.

Dans la culture rwandaise, le blâme était reconnu et même craint. Celui qui faisait l'objet d'un blâme par l'assemblée des sages devrait se racheter au prix de plusieurs cruches de bières; tandis que de nos jours, personne ne craint pratiquement pas le blâme surtout en matière des juridictions Gacaca; ce qui est craint c'est plutôt l'emprisonnement [Field data].

[In Rwandan culture, reprimand was acknowledged and feared. Anyone who was subjected to reprimand by the assembly of wise persons had to make amends by paying many traditional jugs containing beer. However, nowadays, nobody fears reprimand especially in what regards *Gacaca* courts. What people fear rather is imprisonment].

In the past, anyone who misbehaved was subject to public reproach before the panel of *inyangamugayo*. He was therefore immediately excluded from the committee for having tarnished the image of *inyangamugayo*. Many respondents noted that, in the traditional Rwandan society, this was one of the most terrible punishments. The modern *Gacaca* revived this traditional norm to deter any *inyangamugayo* who would misbehave or fail to discharge his duties properly. The reality is that most of the social vices such as the ethnic-based divisionism seen today never existed in traditional Rwanda. They are rooted in the 1994 genocide ideology.

Regarding this provision, officials from selected human rights organisations complained that this sanction is no longer relevant today: “In the past, blame followed you whenever you went in all spheres of life, but today even if you are blamed in *Gacaca*, you can be a leader in any other public institution,” one respondent said. Another respondent cited a Kinyarwanda saying *mvira mu rugo si yo mvira mu isi*, literally meaning, ‘even if you kick someone out of your house, he/she can be accommodated elsewhere in the world’. Despite all these criticisms, the majority of the respondents agreed that any *inyangamugayo* found guilty of misbehaviour or divisionism in the *Gacaca* system was summarily dismissed.

At the time of the modern *Gacaca* production, the concept of *kugawa mu ruhamwe* [reprimand in public] did not carry the same weight that it used to have in tradition. This change finds its justification in the theories of culture because, as Lefevre (1992, 17) explains, language is “the expression and repository of culture”. Though the reality expressed in the concept *kugawa mu ruhamwe* does not have the same magnitude in the modern conception, this “social reality” that was revived has “specific meaning and relevance” to the post-genocide context (Schutz quoted by Bryman 2008, 1). In this respect, in the translation of this provision, it is important to understand all cultural aspects implied in the concept of *kugawa mu ruhamwe* and highlight its specificity to the traditional *Gacaca* as shown in Table 5.22.

Table 5.22. Original source text with my proposed translations of Article 16§2 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Icyemezo cyo kwirukana [...] uwakuruye amacakubiri n'uwakoze igikorwa gituma atakwitwa inyangamugayo, gifatwa mu nyandiko n'abagize Inteko y'urukiko Gacaca imaze kugisha inama Inama Rusange y'Akagari akomokamo. Uwo wirukanywe agayirwa imbere y'Inama Rusange kandi ntashobora kongera gutorerwa kuba inyangamugayo.	[Conformément à la tradition rwandaise,] la perte de la qualité d' <i>inyangamugayo</i> , [...], pour avoir semé le divisionnisme et pour avoir commis un acte incompatible avec l'ensemble de qualités d' <i>inyangamugayo</i> est décidée par écrit par les membres du Siège de la Juridiction Gacaca après consultation des membres de la communauté de la Cellule . Le membre ainsi démis fait l'objet d'un blâme devant la communauté et ne peut être encore choisi comme <i>inyangamugayo</i> .	[In conformity with the Rwandan tradition,] the decision to dismiss <i>inyangamugayo</i> , who, [...], has instigated divisionism or has acted in a way incompatible with the overall attributes of <i>inyangamugayo</i> , shall be made in writing, by the members of the Bench of the Gacaca Court, after consultation with the Cell community . The member so dismissed shall be subject to official reprimand before community members and shall not be chosen again as <i>inyangamugayo</i> .

Aspect 3: Offences Relating to Rape or Acts of Torture against Sexual Parts

Procedures for filing cases of rape and torture against sexual parts are presented in three languages in Table 5.23.

Table 5.23. Original Version of Article 38§1&4 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Ku byerekeranye n'ibyaha byo gusambanya ku gahato cyangwa kwangiza imyanya ndangabitsina , uwahohotewe yihitiramo mu bagize Inteko y'Urukiko Gacaca rw'Akagari inyangamugayo imwe cyangwa nyinshi ashyikiriza ikirego cye, cyangwa akagitanga mu buryo bwanditse . [...]	Concernant les infractions de viol ou de tortures sexuelles , la victime choisit parmi les membres du Siège de la Juridiction Gacaca de la Cellule, une ou plusieurs personnes intégrées à qui elle présente sa plainte, ou la transmet par écrit . [...]	As regards offences relating to rape or acts of torture against sexual parts , the victim chooses among the Seat members for the Gacaca Court of the Cell, one or more to whom she submits her complaint or does it in writing . [...]
Ntibyamewe kwirega icyo cyaha mu ruhame. Nta n'uwemerewe kukirega undi mu ruhame. Imihango yose y'iburanisha ry'icyo cyaha ikorwa mu muhezo.	Il n'est pas permis, pour cette infraction, de faire l'aveu en public. Personne non plus n'est permis d'en déposer la plainte publiquement. Toute la procédure est à huis-clos pour cette infraction.	It is prohibited to publicly confess such an offence. Nobody is permitted to publicly sue another party. All formalities of the proceedings of that offence shall be conducted in camera.

This provision describes the modalities of filing cases of offences relating to rape or acts of torture against genital organs. The main problem encountered in the translation of this provision lies in the fact that these offences were not known in the traditional *Gacaca*. Furthermore, all matters pertaining to sexual parts were considered as taboo and could not be uttered in public. However, because the 1994 genocide was characterised by such atrocious crimes, it was necessary to provide for procedures for handling these cases in the modern *Gacaca*. In the translation of this provision, it is important to understand the way sexual parts were considered in the traditional discourse and the emergence of related crimes in the contemporary society, especially during genocide.

In the views of the majority of law expert respondents, the crime of rape or sexual abuse was not known in Rwandan culture. As one advocate noted, this crime never existed in traditional Rwanda:

Le viol ou la torture sexuelle sont des notions qui étaient pratiquement inexistantes dans la culture rwandaise. Les femmes étaient très respectées et on imaginait mal le viol d'une femme. La répression même du viol est très récente au Rwanda"(Field data).

Rape or acts of torture against sexual parts are concepts which did not virtually exist in traditional Rwanda. Women were so respected that it was hard to imagine a rape of a woman. Punishment against rape is even quite new in Rwanda].

However, some respondents, especially the Human Rights cohort, had a different position on this: "though no similar cases of crime were recorded in the past, they existed but without the same degree of gravity. However, since society upheld the value of public decency, such crimes were hidden from the public". Similarly, one lawyer corroborated this idea by saying that sex-related words were taboo in Rwandan culture. That is the reason why it was not allowed to disclose this crime in public:

Ceci est le reflet de la culture rwandaise. Les relations sexuelles, les organes génitaux et tout ce qui est relatif au sexe ont toujours été pris comme quelque chose d'intime qui ne doit pas être dit en public. Cette considération du sexe est le soubassement même de cet article. Voilà pourquoi même, il n'est pas permis de plaider coupable en public en cas d'infractions en rapport avec le sexe. Ceci est en fait dans le but de protéger l'identité de la victime [Field data].

This reflects the Rwandan culture. Sexual intercourse, genital parts and whatever is related to sex have always been considered a taboo that should not be spoken about in public. This special consideration given to sex is the real gist of this provision. That is the reason why guilt plea in public is not allowed in case of sex-related offences. The provision is intended to protect the victim's identity].

In the interpretation of this provision, all the interviewed human rights officials noted another different element linked to the context of traditional society: people did not know how to write and all complaints were verbally submitted to *inyangamugayo*. In fact, most respondents shared the view that, in traditional Rwanda, rape was a rare crime, and that if ever it occurred, utmost secret was kept about it. This started with the victim herself, who was always a female. As anthropologists and sociologists indicated, in case a girl was made pregnant out of wedlock, which was an abomination in traditional Rwanda, the following arrangements could be made when the secret could not be kept:

1. Secretly, the head of the girl's family presented the case to the head of the culprit's family. Generally, an agreement was reached and the culprit was asked or forced to marry the girl. But of course, this could be accepted if the culprit was unmarried himself.
2. In case the culprit refused recognition, the girl was killed (thrown in Lake Kivu) or ostracised.
3. During the procedure, the family could choose to send the girl to a family friend far away to protect her and her family from enduring public humiliation.
4. If the culprit was a married man who was not ready to take the victim as his wife, the former would be constricted with social ostracism or sentenced to paying a number of cows to the victim family, or both punishments would be imposed on the culprit at the same time. [Field data].

In general, other serious horrendous cases of genital mutilation or other sexual mistreatment were unknown. Minor or serious, the reality is that most of the crimes that humanity faces today never existed in the past. They simply resulted from the incessant socio-economic and cultural changes that occurred with time. Describing the South African customary laws (Lewin 1971, 21), listed a number of crimes which did not exist in the South African society but which very often bring contemporary natives to court due to rapid change in the country's socio-economic conditions. As noted in Chapter one, these crimes are related to money, goods and services, insurance, and violations of contracts of all kinds. In connection with sex-related offences, the majority of respondents unanimously supported the idea of resorting to secret hearing of cases presented in the modern *Gacaca*: this measure was taken to preserve the reputation of victims of rape. However, all were indignant at the fact that this law allows the verdict on such cases to be read in public. In support of the provision, the respondent from MINIJUST (legal drafter) specified that the same provision also existed in the statute law courts. Another important point raised was that these crimes were used as a weapon in the execution of the genocide plan. Considering all the aspects described above, the translation of this provision requires deeper understanding of the socio-cultural context of Rwanda and the 1994 genocide. This can help to avoid diluting the meaning of these crimes as done in the French translation: *les infractions de viol ou de torture sexuelle* (translated literally as 'crimes of rape or sexual torture'). As one lawyer argued, the French concept *torture sexuelle* has a very broad meaning:

Quand on parle de torture sexuelle, c'est quelque chose de très large; même le viol est une forme de torture sexuelle. 'Kwangiza imyanya ndagagitsina' que je traduirais par 'la torture des organes génitaux' fait aussi partie intégrante de la torture sexuelle.

[The concept sexual torture is too broad because rape is also a kind of sexual torture. The phrase *kwangiza imyanya ndagagitsina* that can be translated as 'torture of genital parts' is also part and parcel of sexual torture]. (Field data)

The same problem also lies in the mode of presenting this crime to the bench of *inyangamugayo*, where writing was suggested. As we are all aware, writing does not necessarily guarantee secrecy. Thus, the translator can allow some additional clarification, as in the TL texts in Table 5.24, showing how this derives from the Rwandan tradition where such crimes were not disclosed for decency purposes. Once again, this solution shows how reality is dependent on culture, and tallies with the statement by Halliday (1992, 72) that "by working with language you can change social reality". In this connection, the social reality about sex that is expressed can only make sense if the translator takes into consideration the language and the culture in which this reality is embedded.

Table 5.24. Original source text with my proposed translations of Article 38§1&4 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Ku byerekeranye n'ibyaha byo gusambanya ku gahato cyangwa kwangiza imyanya ndangabitsina, uwahohotewe yihitiramo mu bagize Inteko y'Urukiko Gacaca rw'Akagari inyangamugayo imwe cyangwa nyinshi ashyikiriza ikirego cye, cyangwa akagitanga mu buryo bwanditse. [...] Ntibyemewe kwirega icyo cyaha mu ruhamwe. Nta n'uwemerewe kukirega undi mu ruhamwe. Imihango yose y'iburanisha ry'icyo cyaha ikorwa mu muhezo.	[En conformité avec les normes de la tradition rwandaise en matière de pudeur,] la victime des infractions de viol ou de torture contre les parties génitales, choisit un ou plusieurs <i>inyangamugayo</i> du Siège de la <i>Juridiction Gacaca</i> de Cellule à qui elle soumet [en secret] sa plainte verbalement ou par écrit. [...] Il n'est pas permis de faire l'aveu de cette infraction en public. Il n'est non plus permis à personne d'en déposer la plainte publiquement. Toute la procédure est à huis clos pour cette infraction.	[In conformity with norms of Rwandan tradition as regards public decency,] the victim of offences relating to rape or acts of torture against sexual parts, shall choose one or more <i>inyangamugayo</i> from the Bench of the Gacaca Court of the Cell to whom he/she shall submit [in secret] his/her complaint verbally or in writing. [...] It is prohibited to publicly confess such an offence. Nobody shall be permitted to publicly sue another party. All the proceedings of that offence shall be conducted in camera.

Theme 4: Language Aspects with Regard to Meaning, Reality and Context

Aspect 1: Modern *Gacaca* Court Structure

Table 5.25 is a trilingual presentation of the article providing for the modern *Gacaca* court structure.

Table 5. 25. Original version of Article 3 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Hashyizweho Urukiko Gacaca rw'Akagari muri buri Akagari, Urukiko Gacaca rw'Umurenge n'urukiko Gacaca rw'Ubujurire muri buri Murenge wa Repubulika y'u Rwanda [...].	Il est créé une Juridiction Gacaca de la Cellule au niveau de chaque Cellule, une Juridiction Gacaca de Secteur et une Juridiction Gacaca d'Appel au niveau de chaque Secteur de la République du Rwanda [...].	It is hereby set up the Gacaca Court of the Cell in each Cell, the Gacaca Court of the Sector and the Gacaca Court of Appeal in each Sector of the Republic of Rwanda [...].

This provision is about the administrative setting of Rwanda during the genocide. At that time, the cell was the lowest official administrative unit followed by the sector. The reality about the genocide was that crimes were committed openly by the population against their neighbours in their own villages. Hence, there was no other possibility of establishing the truth without active and close collaboration between the community and the *Gacaca* courts. This provision is structured in a mandatory statement that establishes these courts at the grassroots. It therefore brings the courts closer to the population where the crimes were committed. The translation of this provision poses a very serious problem because it deals with a court structure which is completely new. This structure does not belong either to the traditional *Gacaca* or to the statute law systems. It instead followed the reality and context of the administrative structures existing in Rwanda during the genocide. Thus, the translator needs to understand properly the reality and context behind this new structure that was adopted while establishing the modern *Gacaca* courts. According to one respondent (advocate), this clause is important in so far as it establishes the different courts and sets out their competence:

Cette précision joue un rôle très important surtout en ce qui concerne la compétence de chaque juridiction. Autrement dit, on penserait qu'il n'y a que trois juridictions au Rwanda, l'une pour connaître des affaires au niveau des cellules, l'autre au niveau des secteurs et une juridiction d'appel.

[This precision plays a very important role especially in determining competence of each court. On reading this stipulation, one may think that only three courts exist in Rwanda: the first that deals with cases at the cell level, the second at the sector level and the third at the level of appeal].

However, all the respondents show that this territorial structure did not exist in traditional Rwanda until contemporary Rwanda in a new political order. On this point, one elder said, “there was no distinct hierarchical organisation within the traditional *Gacaca* Courts”. However, another one added that, “strong and large families had some levels whereby the family head at regional or national level (e.g. the head of the *Abega* clan or the *Abatsobe* clan) had to be informed on decisions taken at lower levels, but he was not instrumental”. For another respondent, “judiciary competence was found only at village level”. In translating this provision, it is necessary to highlight the difference between the two institutional systems involved. Furthermore, the administrative structures on which the modern *Gacaca* courts are modelled are specific to Rwanda at the time of genocide. In this respect, the modern *Gacaca* court structure is viewed as an institution whose organisation underlies “the political and social life” of Rwanda and this is reflected in “its institutional terms” (Newmark 1988, 99). Rwandan institutions have always undergone constant change through space and time. Thus, the translation of this reality should conform to the issue of emergence of discourse as suggested by Fairclough (2003, 931) and take into consideration this institutional change. In this context, the names of the

existing administrative structures of cells and sectors were rewoven to produce the modern *Gacaca* structures. All this information helps to render this provision more accurately by explaining the main reason that pushed drafters of the modern *Gacaca* to model its court structure on the administrative entities prevailing at the time of genocide. As stressed in the translations presented in Table 2.26, this was intended to achieve maximum community participation in the *Gacaca* process.

Table 5.26. Original source text with my proposed translations of Article 3 (Modified and completed by Organic Law n° 13/2008 of 19/05/2008)

Kinyarwanda	French	English
Hashyizweho Urukiko Gacaca rw'Akagari muri buri Akagari, Urukiko Gacaca rw'Umurenge n'urukiko Gacaca rw'Ubujurire muri buri Murenge wa Repubulika y'u Rwanda [...].	[Suivant les entités d'administration locale en place pendant le génocide et dans l'objectif d'atteindre une participation maximale des membres de la communauté], il est créé une Juridiction Gacaca de la Cellule dans chaque cellule, une Juridiction Gacaca de Secteur et une Juridiction Gacaca d'Appel dans chaque Secteur de la République du Rwanda.	[On the basis of local administrative structures prevailing at the time of genocide and in order to achieve maximum community participation], the following are hereby set up: the Gacaca Court of the Cell in each Cell, the Gacaca Court of the Sector and the Gacaca Court of Appeal in each Sector of the Republic of Rwanda.

Aspect 2: The Principle of Truth in *Gacaca* Courts

One of the main principles of *Gacaca* courts is upholding truth. The latter is described in Table 5.27.

Table 5.27. Original version of Article 29§3

Kinyarwanda	French	English
Afatwa nk'udatanze ubuhamya ku byo yabonye cyangwa azi umuntu wese bigaragaye ko yari afite ibyo azi ku kibazo runaka abandi bagaragaje, ahari akicecekera ntagire icyo abivugaho.	Est considérée comme personne ayant omis de témoigner sur ce qu'elle a vu ou sur ce dont elle a connu toute personne dont on a constaté qu'elle disposait des informations sur une affaire quelconque révélée par les autres, étant présente et ayant préféré de ne rien dire à ce propos.	Is considered as refusing to testify on what he or she has seen or known, any person who apparently knew something on a given matter denounced by others in his or her presence, without expressing his or her own opinion.

This provision is intended to punish whoever refuses to tell the truth on what he knows about the 1994 genocide. This is rooted in the Rwandan

tradition where it is believed that truth could heal: “*ukuri kurakiza*”. This can as well apply to another Kinyarwanda context of *gukiza* that means ‘to save’. Firstly, when someone opens up and reveals that he/she is the one who wronged someone else, this makes the offended party feel relieved. Secondly, many people avoid danger after hearing of a plot against them. The translation of this provision poses a problem in that it reflects the special reality and context of the Rwandan genocide, which was characterised by massive participation of the population in the killings. In addition, the genocide left behind many victims with physical and psychological wounds. Thus, the translator needs to understand the reality and context that justify this traditional principle of truth and reconciliation that was incorporated into the modern *Gacaca* law as a therapy for wounds of genocide. A better solution to the above translational problem is found in the data collected from varied sources. In this respect, a respondent from the cohort of elders indicated that in traditional Rwanda, refusing to testify was punished as a serious offence because it was considered as an intentional refusal to contribute to dispute settlement and reconciliation between relatives. Other respondents (historians) confirmed the existence of such practice: “whoever was found guilty of hiding the truth was publicly denounced and forced to testify; otherwise, if one resisted, they were liable for serious punishments”. Nevertheless, the data obtained from lawyers, advocates and human right activists revealed that this provision coerced people into testifying. In this respect, one respondent (lawyer) explained how this provision was completely at odds with the principles of the modern statute law:

C'est tout à fait contraire aux principes des juridictions ordinaires. Normalement on parle du refus de témoigner seulement lorsqu'une personne a refusé de répondre à ce qui lui a été demandé.

[This completely contradicts the principles of the statute law courts. Refusal to testify is normally established when one refuses to answer what he has been asked].

Similarly, a respondent from LIPRODHOR noted the rationale behind this provision: “in *Gacaca* law, everyone is a witness, which is different from other ordinary courts”.

Considering the data from all the respondents, we find that this provision is typical to the traditional *Gacaca*. It reflects the facts about the context of genocide, especially the massive participation of the population in the killings. Even those who did not participate provided some indirect support in the killings or plotted against their neighbours. Others were accused of ‘failure to render assistance to a person in danger’, which is a serious crime in criminal law (Guinchard and Debard 2011). However, this does not exclude those who tried all their best to save some people who were targeted. The reality from this is that all community members knew what had happened in their neighbourhood. A significant number of respondents, save for experts in the modern law and human right activists, agreed with

the appropriateness of this provision in its traditional and modern form. The solution to this problem finds its explanation in the theory explained by Bryman (2008) and Hickey (1998) as the discourse used in this law gives meaning to a context of social life that is not necessarily applicable to other circumstances. Thus, in order to render its meaning more faithfully in the TL versions, the translator should highlight the importance of telling the truth as enshrined in Rwandan tradition.

Table 5.28. Original source text with my proposed translations of Article 29§3

Kinyarwanda	French	English
Afatwa nk'udatanze ubuhamya ku byo yabonye cyangwa azi umuntu wese bigaragaye ko yari afite ibyo azi ku kibazo runaka abandi bagaragaje, ahari akicecekeramtagire icyo abivugaho.	[Pour maintenir le principe de la vérité qui faisait partie intégrante de la tradition rwandaise] , est considérée comme personne ayant omis de témoigner sur ce qu'elle a vu ou sur ce dont elle a connaissance, quand il est prouvé qu'elle disposait des informations sur une affaire quelconque révélée par les autres, étant présente et ayant préféré de ne rien dire à ce propos.	[To uphold the principle of truth enshrined in Rwandan tradition] , a person is considered to have refused to testify on what he or she has seen or known, when it is proved that that person knew something on a given matter denounced by others in his or her presence, without expressing his or her own opinion.

Apect 3: Testimonies as the Main Source of Evidence in *Gacaca* Court

Translations of the provision on testimonies as the main source of evidence in *Gacaca* court are presented in Table 5.29.

Table 5.29. Original version of Article 33(2)

Kinyarwanda	French	English
Abaturage bose bagize Akagari bagomba gusobanura ukuntu ibintu byagenze cyane cyane aho bari batuye, bakabitangira n'ibimenyetso, bavuga ababigizemo uruhare n'abahohotewe.	Tous les habitants de la Cellule doivent relater les faits qui se sont produits notamment là où ils habitaient et fournir des preuves en dénonçant les auteurs et en identifiant les victimes.	All residents of the Cell shall tell the facts of events which took place , especially in their home villages and give evidence, denounce the authors and identify the victims.

The reality behind this provision is that the main source of evidence in the traditional *Gacaca* was conveyed by word of mouth. People did not know how to read and write; hence there was no professional way of conducting criminal investigations as is the case today. The translation of this provision poses a big challenge because it limits the source of evidence for or against

genocide suspects on oral testimonies. This procedure draws much from the traditional *Gacaca* and is different from that of statute law which resorts to different techniques to establish facts on a case. These techniques include spoken or written testimonies, investigations, documents and forensic evidence. In this respect, the translator needs to understand the reality and context that motivated the adoption of this procedure by the modern *Gacaca*.

Reacting on this issue, one respondent from the cohort of elders said that in the *Gacaca* process, *inyangamugayo* relied on oral testimonies from those who were present at the scene of the crime. Thus, based on tradition, this provision produces a binding effect on the entire population living in a given cell to explain how genocide was planned and perpetrated. To facilitate this process, this had to be recounted orally. This also shows how the community members followed all the events as they unfolded during genocide.

However, the assumption that people knew the truth about genocide was severely criticised by lawyers and officials from selected human rights organisations as “an overgeneralisation that coerced people into making testimonies during the *Gacaca* proceedings”. A respondent from LIPRODHOR commented on this principle: “In the modern *Gacaca*, every person turned out to be a prosecutor, a witness, and party in the conflict. This led to problems in the independence of the judiciary”. However, another respondent (MINIJUST legal drafter) explained how this worked out in a systematic way: “*Tous les habitants de la Cellule doivent relater les faits qui se sont produits notamment là où ils habitaient et fournir des preuves en dénonçant les auteurs et en identifiant les victimes*” [All cell residents must recount how all the events unfolded especially where they were living. They must provide evidence by denouncing perpetrators of the genocide and identifying victims].

Throughout all interviews, the majority of the respondents agreed on the appropriateness of the provision in both traditional and modern *Gacaca*. Thus, in translating this provision, it is advisable to consider the reality and the binding effect expressed in the discourse of this provision. High reliance on oral testimonies is one “organisational feature” of *Gacaca* (Nida, 2001: 69), and according to the data collected, this technique seems to work in the context of Rwanda. However, as Nida (ibid) posits, the fact that this feature is proved to be “excellent” for the Rwandan “language-culture, it does not necessarily fit easily into the patterns of the French or English “language-culture”. In this line, according to Schutz quoted by Bryman (2008, 1) this precedence of testimonies over other sources of evidence is viewed as “social reality” that has a “specific meaning and relevance structure” for Rwandans who live, act, and think within this specific context. Thus, accurate translation of this aspect will be achieved by giving some grounding information on the role of testimonies in *Gacaca* as shown in Table 5.30.

Table 5.30. Original source text with my proposed translations of Article 33 §2

Kinyarwanda	French	English
Abaturage bose bagize Akagari bagomba gusobanura ukuntu ibintu byagenze cyane cyane aho bari batuye, bakabitangira n'ibimenyetso, bavuga ababigizemo uruhare n'abahohotewe.	[Vu le rôle des témoignages dans la révélation de la vérité sur ce qui s'est passé pendant le génocide] , tous les habitants de la Cellule doivent relater les faits qui se sont produits notamment là où ils habitaient et fournir des preuves en dénonçant les auteurs et en identifiant les victimes.	[Considering the role played by testimonies in unveiling the truth about what happened during genocide] , all residents of the Cell shall tell the facts of events which took place, especially in their neighbourhood and shall give evidence denouncing the perpetrators and identifying the victims.

Theme 5: Characterisation of Political Discourse

Aspect 1: Testimony about Genocide

Testifying about genocide is set out as the responsibility of every Rwandan as indicated in Table. 5.31.

Table 5.31. Original version of Preamble §11

Kinyarwanda	French	English
Imaze kubona ko gutanga ubuhamya ku byaha byakozwe ari inshingano ya buri munyarwanda ukunda igihugu cye, akaba nta wemerewe kugira impamvu iyo ari yo yose yitwaza ngo yange kuvuga ibyo yabonye.	Considérant que le devoir de témoignage est une obligation morale de tout Rwandais patriote, nul n'étant en droit de s'y dérober pour quelque cause que ce soit.	Considering that testifying on what happened is the obligation of every Rwandan patriotic citizen and that nobody is allowed to refrain from such an obligation whatever reasons it may be.

This article contains some elements of political discourse with a much more persuasive function. The statement in Table 5.31, extracted from the preamble of this organic law, stresses the responsibility of every Rwandan citizen to love and support their country by telling the truth about whatever they saw. However, on reading this statement, one would think that testifying in the *Gacaca* courts about genocide was the only yardstick to measure the level of patriotism for Rwandans. This is worsened by the translation in French of *inshingano* as *obligation morale* [moral obligation]. Normally in Kinyarwanda, the term *inshingano* means 'responsibility' and 'commitment', and bears a mandatory, self-committing and duty-binding semantic aspects. All these discursual features can cause a serious problem

of misunderstanding of the modern *Gacaca* law if they are not properly dealt with in its translation process.

According to the majority of the respondents, this stipulation could work better in the traditional *Gacaca* in which restorative justice was limited to the family. On this issue, one lawyer wondered whether there was a clear correlation between moral obligation and patriotism: “*Est-ce-que l’obligation morale nous fait comprendre aussi l’amour de la patrie?*” [Does moral obligation imply love for one’s country?] The respondent from a local human rights organisation found this as a form of “manipulation and political intimidation”. Adapting the position by Bryman (2008, 508) to this context, we find how language is related to ideology and contributes to socio-cultural and political change.

In translating this provision, it is necessary to understand it as a political speech where authorities are trying to remind the population about the merits of patriotism that were undermined during the genocide. In other words, the population is called upon to cherish their traditional values. To translate more accurately this part of the preamble, it is necessary to use a more persuasive language reminding people of the responsibility of making testimonies about genocide as enshrined in the Rwandan tradition. The solution is corroborated in the model by Nida (2001, 25) on the four uses of languages by culture (i.e. providing information about processes and values, directing an activity, establishing and maintaining a positive emotional state, and ritual alteration in the status of participants in a culture). In this regard, the language of this provision is used to “direct the activity” of the Rwandan culture, and it establishes and maintains “a positive emotional state for” Rwandan community members within their culture. As shown in Table 5.32, the meaning of the concept of *inshingano* tallies with the concept of ‘responsibility’ instead of ‘obligation’ which means *itegeko* in Kinyarwanda. In the same context, the adjectival phrase *obligation morale* used in the French version should be replaced by *responsabilité* whose ready equivalent is ‘responsibility’ in English.

Table 5.32. Original source text with my proposed translations of Preamble §11

Kinyarwanda	French	English
Imaze kubona ko gutanga ubuhamya ku byaha byakozwe ari inshingano ya buri munyarwanda ukunda igihugu cye, akaba nta wemerewe kugira impamvu iyo ari yo yose yitwaza ngo yange kuvuga ibyo yabonye;	Considérant que [dire la vérité sur ce qu’on connaît et qu’on a vu fait partie intégrante de la tradition rwandaise et que] le devoir de témoignage est une responsabilité, nul n’étant en droit de s’y dérober pour quelque cause que ce soit ;	Considering that [telling the truth about what one knows and what one saw is enshrined in the Rwandan tradition and that] testifying on what happened is the responsibility of every Rwandan patriotic citizen and that nobody is allowed to refrain from this responsibility for whatever reason;

Aspect 2: Eradication of the Culture of Impunity (Preamble §16)

The modern Gacaca law commits Rwandans to eradicating the culture of impunity as expressed in the trilingual texts presented in Table 5.33. Paragraph §16 of the *Gacaca* law is about the need for eradicating the culture of impunity, which is a political decision by the Government of the National Unity that was established just after genocide. This was decided to reverse the tide and make a difference with the governments that ruled Rwanda before and during the 1994 genocide⁵. The main problem faced in the translation of this part of the preamble lies in its discourse and the concept of a culture of impunity that seems to be more a political discourse than a legal concept in the context of Rwanda. Thus, the translator needs to understand the reasons why the political statement ‘eradication of the culture of impunity’ was used to justify the modern *Gacaca* law.

All the respondents deemed the statement to be the right political decision for, as one of them specified, “the fight against impunity is one of the main pillars of reconciliation”⁶, which is clearly spelt out in the main papers of the Government of Rwanda. According to the majority of HRO respondents, this statement shows how the modern *Gacaca* is more of a punitive institution rather than reconciliatory.

Table 5.33. Original version of Preamble §16

Kinyarwanda	French	English
Imaze kubona ko ari ngombwa kurandura burundu umuco wo kudahana mugira ngo ubutabera n'ubwiyunge bishobore kugerwaho mu Rwanda , bityo bikaba ngombwa ko hashyirwaho amategeko yatuma abakoze ibyo byaha n'ibytso byabo bakurikiranwa, bagacirwa imanza vuba, ariko hatagamijwe guhana gusa, ahubwo hanagambiriwe kongera kubaka Umuryango Nyarwanda [...];	Considérant la nécessité, pour parvenir à la réconciliation et à la justice au Rwanda, d'éradiquer à jamais la culture de l'impunité et d'adopter les dispositions permettant d'assurer les poursuites et le jugement rapide des auteurs et leurs complices sans viser seulement la simple répression, mais aussi la réhabilitation de la société rwandaise [...];	Considering the necessity to eradicate forever the culture of impunity in order to achieve justice and reconciliation in Rwanda , and thus to adopt provisions enabling rapid prosecutions and trials of perpetrators and accomplices of genocide, not only with the aim of providing punishment, but also reconstituting the Rwandan Society [...];

However, considering the meaning of this discourse, we find that it does not contradict the very essence of the traditional *Gacaca*. The data from Rwandan elders revealed that, though there were no prisons in the past, nobody could go unpunished for the wrong one did. One respondent from the group stressed: “the culture of impunity did not exist since families referred their cases to other families and the latter applied sanctions. It was a shame for a member of their family to commit a crime”. To recall the

reconciliatory nature of *Gacaca*, a respondent from the cohort of anthropologists explained that the traditional *Gacaca* system achieved the same goal of correcting and reforming the wrongdoer through exhaustive exploitation of testimonies.

The inclusion of the political concept of culture of impunity shows how language is “a power source that is related to ideology and socio-cultural change” (Bryman 2008, 508). Based on the views of the respondents and following the four sets of organisational issues developed by Fairclough (2003, 931–933), we find that the concept of culture of impunity is an “external discourse” that was “internalised” within *Gacaca* (Table 5.34). It was therefore operationalised in order to achieve *Gacaca*’s main goal of national reconciliation as one of the key missions of the Government of National Unity. A proper translation of the provision should therefore relate this discourse to the context and the reality of the modern *Gacaca* law production. The reality is that the modern *Gacaca* was initiated after the genocide that was masterminded and executed by a government on its own citizens.

Table 5.34. Original source text with my proposed translations Preamble §16

Kinyarwanda	French	English
Imaze kubona ko ari ngombwa kurandura burundu umuco wo kudahana kugira ngo ubutabera n'ubwiyunge bishobore kugerwaho mu Rwanda, [...];	[Considérant que le génocide a été planifié et exécuté par le gouvernement sur ses propres citoyens] , pour parvenir à la réconciliation et à la justice au Rwanda, il ya un nécessité d’éradiquer à jamais la culture de l’impunité;	Considering [that genocide was masterminded and executed by the government on its own citizens] , there is a necessity to eradicate forever the culture of impunity in order to achieve justice and reconciliation in Rwanda;

Aspect 3: Call for Exclusive Responsibility of Rwandans to Solve Genocide-related Problems

Table 5.35 presents an exclusive responsibility of Rwandans to solve genocide-related problems Stated in the Preamble.

Table 5.35. Original version of Preamble §17

Kinyarwanda	French	English
Imaze kubona ko ari ngombwa ko Umuryango Nyarwanda ari wo ubwawo ugomba kwikemurira ibibazo byatewe na jenoside n'ingaruka zayo;	Considérant qu'il importe pour la société rwandaise de résoudre elle-même les problèmes causés par le génocide et ses conséquences ;	Considering the necessity for the Rwandan Society to find by itself, solutions to the genocide problems and its consequences ;

Paragraph §17 of the Gacaca law draws from a political discourse that reminds Rwandans that they are the only ones concerned in the resolution of the 1994 genocide consequences. The statement contradicts the principle provided for in international law and conventions to the extent that genocide is an international issue (see the Convention of the Prevention and Punishment of the Crime against Genocide). However, if we consider the magnitude of the 1994 genocide, whereas after the 1945 genocide of the Jews, the international community had decided that a similar case would never happen again anywhere in the world, one may find some truth underlying the discourse used. Despite such a strong statement and all the measures taken to prevent genocide, forty years later, genocide took place again in Rwanda in the eyes of the international community. After undergoing all that, Rwandans eventually understood the meaning of the Kinyarwanda saying *usenya urwe umutiza umuhoro* whose English equivalence can be 'give a fool a rope and he will hang himself'. To render the meaning of this provision into the target languages requires the translator to understand all its discursive features and relevance to the modern *Gacaca*.

The above explanation of the problem involved in the translation of this part of the preamble corroborates all the data collected. In the same line of argument, the respondent from MINIJUST stressed that no one else but Rwandans themselves were the most concerned people in solving the problems and consequences of genocide: "*Cette phrase dit vrai! Les rwandais sont les premiers concernés par le génocide des Tutsi. Ils sont donc les premiers à en assumer les conséquences*". [The statement is true! Rwandans are the first to be concerned by the genocide against the Tutsi. Thus, they are first to face its consequences].

Nonetheless, one respondent found the statement over-exaggerated, for in his view, "the effects of genocide cannot be resolved by laws and the *Gacaca* courts alone". Conversely, another respondent agreed with the statement. His view was: "*Gacaca* played a big role since it solved simple issues of conflict, and this brought stability to society".

Looking closely at this decision by Government of Rwanda (GoR), we find that it instilled a sense of courage and hope among Rwandans in order to contribute to the success of the modern *Gacaca*. As explained by historians, linguists and elders, GoR's determination is inspired by the traditional *Gacaca*. According to one Rwandan elder, in the traditional *Gacaca* "there was no recourse to official administration. *Gacaca* was autonomous at family level, which is the society foundation". Another Rwandan elder mentioned the case of vendetta which was a blood feud in which the family of a murdered person could seek vengeance on the murderer or the murderer's family. Although the latter was not a serious crime as genocide, it was settled by the concerned families. Another respondent from the cohort of elders said that this responsibility was appropriate and constituted a matter of pride for every adult Rwandan. The entire Rwandan community

had to understand the necessity of individual independence and sovereignty in the resolution of personal problems. The majority of the respondents from the cohort of historians and sociologists commended the appropriateness of such political decisions in the traditional and modern *Gacaca*.

In a nutshell, in the translation of this statement from the preamble, it is necessary to bring out the cultural aspects of *Gacaca* as enshrined in the Rwandan traditional values and practice of solving their own problems. The best translational solution is henceforth to exploit the traditional beliefs and cultural values that Rwandans hold dear, especially family pride and respect. In addition, this political discourse shows how language is “a power source” that is used to achieve socio-cultural change (Bryman 2008 and Fairclough 2003). The provision arouses in Rwandans the need to find solutions to dire consequences of the genocide. The translations in Table 5.36 take into consideration the discursual features used in the following statement that draws from Rwandan tradition.

Table 5.36. Original source text with my proposed translations of Preamble §17

Kinyarwanda	French	English
Imaze kubona ko ari ngombwa ko Umuryango Nyarwanda ari wo ubwawo ugomba kwikemurira ibibazo byatewe na jenocide n'ingaruka zayo	Considérant qu'il incombe à la société rwandaise de résoudre elle-même les problèmes causés par le génocide et ses conséquences [comme c'était le principe dans la tradition rwandaise] ;	Considering that it is the responsibility of the Rwandan Society to find, by itself, solutions to the problems caused by the genocide [as was the principle in the Rwandan tradition];

Aspect 4: Mandatory Participation in *Gacaca* Court Activities

Table 5.37 presents the obligation of Rwandans to participate in the *Gacaca* process.

Table 5.37. Original version of Article 29 §1

Kinyarwanda	French	English
Kwitabira imirimo y'Inkiko Gacaca ni itegeko kuri buri munyarwanda.	Participer aux activités des Juridictions Gacaca est une obligation pour tout Rwandais.	Every Rwandan citizen has the duty to participate in the Gacaca courts activities.

This provision is a political decision that obliges the entire Rwandan population to participate in the *Gacaca* court activities. It contradicts the principle of the modern statute law where only the plaintiff and the defendant are required to attend trials. Other parties may be asked to appear only upon request by the court as witnesses. It does not even tally with the

principles of the traditional *Gacaca*, which was not based on such constraints rather on moral and social obligations. In his translation activity, the translator needs to help the target readership understand the relevance of this provision that is in contradiction with the principles followed by other legal systems involved in the translation of the modern *Gacaca* law. One lawyer provided some details on how this modern legal principle works:

Ordinairement, c'est le principe 'pas d'intérêt, pas d'action' qui joue en matière de justice. Personne ne sera obligé de participer, activement, ou même passivement à un procès dans lequel il n'a pas d'intérêt.

[Normally, in justice it is the principle of 'no interest, no action' that plays. No one is obliged to participate, actively or even passively, in a hearing in which he does not have an interest].

Another weakness of the modern *Gacaca* castigated by some legal experts and human right activists is that it assumes that all Rwandans were physically present during the 1994 genocide, and therefore, they all witnessed what happened. In this regard, one lawyer criticised this provision for overgeneralising and being too coercive. In his view, it is unlikely for all Rwandans to have had full knowledge about what happened during the genocide. For example, he mentioned the case of some Rwandans who were outside the country during that period :

Cette loi a complètement ignoré qu'il y avait des rwandais qui vivaient à l'extérieur qui ont regagné le pays après 1994 et elle a obligé tout le monde à participer aux activités des juridictions Gacaca prétendant qu'ils avaient tous à y contribuer.

[This law completely ignores that there are some Rwandans who were living outside and who returned to the country after genocide. Compelling everybody to participate in the *Gacaca* activities is assuming that they all have something to contribute].

Furthermore, in full agreement with lawyers, one human rights activist found that the provision was in contradiction with the practice of the traditional *Gacaca*: "nobody was obliged to attend *Gacaca*. Community members were socially and morally bound to contribute to justice". In the views of historians and elders, only the selected *inyangamugayo* and some influential members of both families had the obligation to attend the *Gacaca* hearings. However, one lawyer from MINIJUST supported the appropriateness of the provision due to the very nature of the *Gacaca* system and the context of the 1994 genocide:

Si tout le monde doit être accusateur et avocat, il faut justement que tout citoyen participe à la conduite des procès devant ces juridictions"

[If everybody has to be at the same time prosecutor and advocate, it is an obligation for each citizen to participate in the *Gacaca* courts' hearings].

The majority of the respondents did not appreciate the fact that this participation was made compulsory even to those who had no interest in the cases. The translation of this novelty that was introduced into the modern *Gacaca* law should consider Rwanda as a human society or community is characterised by institutions that contribute to its organisation. In this connection, *Gacaca* is one of its institutions, and the mandatory participation in the *Gacaca* courts activities by the entire population is a political decision that provided “necessary conditions for the persistence of social life” (Thompson 1984, 129) for the Rwandan community. As shown in the translated versions in Table 5.38, it is important to single out the contradiction of this principle with regard to the traditional *Gacaca* and the modern legal system. As a solution, the target texts include in square brackets some background information to justify the relevance of this mandatory participation in the *Gacaca* activities.

Table 5.38. Original source text with my proposed translations of Article 29 §1

Kinyarwanda	French	English
Kwitabira imirimo y'Inkiko Gacaca ni itegeko kuri buri munyarwanda.	[Quoique différent du principe juridique traditionnel et moderne, la participation] aux activités des Juridictions Gacaca est obligatoire pour tout Rwandais [pour maximiser la participation des membres de la communauté].	[Though different from both traditional and modern legal principles], every Rwandan citizen shall have the duty to participate in Gacaca courts' activities [to ensure maximum participation of community members].

¹ The administrative structure that was led by a Chief during the monarchical system.

² See Art. 152 of the Constitution of the Republic of Rwanda of 2003.

³ *Umuganda* is a community participation mechanism that is unique to Rwanda.

⁴ Burundi is a neighbouring country with Rwanda. Though their languages, Kirundi and Kinyarwanda, have many concepts that are designated by different terms, there is mutual intelligibility between the two languages and the populations of these countries share a lot in the way they design different cultural referents. The intelligibility between these two languages is discussed in details in Kayigema (2010).

⁵ See *Leave None to Tell the Story*.

⁶ See also EDPRS and vision 2020

CONCLUSION

The main objective of this monograph was to identify challenges involved in the translation of customary laws with more focus on Rwanda's *Gacaca*. As demonstrated throughout the work, the translation of customary laws is dependent on the following major aspects: language, culture and context, society and ideology. As was noted, anybody translating customary law, like Rwanda's *Gacaca* law, should not be limited to charting equivalences between words that constitute its sentence structures. It should instead go beyond the words and sentences and consider the historical background of the law, its society, culture and the context of its production.

Gacaca is a legal system that existed in ancient Rwanda, where it has been used to settle conflicts between members of the Rwandan society. The *Gacaca* courts were a family business whose panel was composed of *inyangamugayo*, wise and respectable elders selected from families of both the litigant and plaintiff. At that time, the jurisdiction of the system was to handle relatively minor offences that prevailed in that period. However, with the arrival of colonisers in Rwanda, the system was abandoned and the country adopted a new legal system based on Western statute law.

When in 1994, Rwanda experienced an extremely serious and deadly crime of genocide, the existing conventional courts failed to cope with the situation. Too many people were involved in the killings and the country became overwhelmed by an exponential number of cases that required trial. It is on this context that the Government of National Unity that was established after genocide revived the traditional *Gacaca* system and adapted it to fit the context of the times. The move produced what is referred to in this book as 'modern *Gacaca* law'. I coined the term basing on the premise that, though it bears a good deal of the Rwandan culture, the newly created law also incorporates several aspects of the modern law, which are embedded in its language and content.

My position in this monograph is that, ever since they were created, human beings have had different laws, which have been subjected to change or extinction due to foreign influence. The situation worsened with the arrival of Europeans in different parts of the world. When they introduced their own legal systems, a few customary laws managed to resist. In some parts, these indigenous laws were totally abolished or died a natural death, and statute laws were developed to take over. This is the same fate that was reserved to the Rwandan legal system. It draws its gist from laws and decrees enacted respectively by the Legislative and the Executive powers. Though Rwanda's customary law sank into oblivion to give space to the coloniser's legal system, it continued to exist in the memory of older people. However, the fact that *Gacaca* had never been codified and translated complicated the production of the modern *Gacaca* law in the country's three official languages.

Though the modern *Gacaca* law was translated into English and French, the process failed to adhere to the principles of the target legal systems. The main cause of these challenges resides in the differences existing between the three legal systems. The main sources of the English law are case-law, equity and statute law. As for the French legal system, it is based on organised codes and collections. Though the two systems are both European, they differ in many ways in terms of court structure, sources of law and procedures, crime classification, and context.

Considering the divergence between the source and target legal systems, and more particularly, the special nature of the modern *Gacaca* law, this book adopted special theories and approaches to overcome resulting hurdles. Subsequent to these, the best strategy that I adopted in the translation of the *Gacaca* law was to rely on a theory that goes beyond words and sentences, and integrates all aspects of society, culture and context.

As I demonstrated, culture uses language to express the realities constructed by the members of a given society, and all this is dictated by the prevailing socio-cultural context. However, a crucial problem can arise when we need to transfer these realities from one culture to another. This is the problem that translators faced in the rendition of the *Gacaca* law from Kinyarwanda into French and English. *Gacaca* is a culture and context-specific law that requires a bicultural mediator with sufficient mastery of both the source culture (i.e. Rwandan culture) and the target cultures (i.e. French and English cultures). The translational activity required should be the one that considers all different cultural aspects embedded in the modern *Gacaca* law, the context of its production, and the way the reality it expresses was constructed to suit its end-users. For the case of *Gacaca*, I recommend, a good cultural mediator endowed with a high tolerance and accommodation of differences.

This can be achieved by reconstructing aspects from the traditional *Gacaca* and transferring them into the modern *Gacaca* to suit the post-genocide context. For the aspects that belong to the statute law, it is important to integrate them adequately to avoid causing confusion to the target reader. If its integration creates new and special aspects that cannot be found in the systems, my suggestion is to consider their acquired character in their translation from Kinyarwanda into French and English.

Regarding aspects that are extremely culture and context-bound, i.e. elements which did not exist as such in the traditional *Gacaca*, my advice is first of all to understand that they were reconstructed and adapted to suit the context of genocide and the modern *Gacaca* law. In their translation, I propose to bring to the fore the special challenges of the period after the 1994 genocide, and make the reader understand that these challenges necessitated a special law like the modern *Gacaca*.

This solution applies to Rwandan culture-specific aspects that consist of a range of beliefs, ideas and values that were traditionally shared among Rwandans. All these features depict the way the traditional Rwandan community members perceived life. Though my analysis revealed that it was not easy to translate these aspects into French and English, my suggestion is to leave them as such and provide additional explanatory notes that list all the implied semantic aspects. One of the most prominent examples that this solution handled is the term *inyangamugayo*.

The analysis of language aspects pertaining to meaning, reality, and context in the *Gacaca* law shows that Rwanda's genocide was characterised by massive involvement of the population. This assigns to the 1994 genocide a special character, i.e. the context and reality in the way the crime *per se* was committed and the judicial solutions that had to be envisaged. Thus, in translating these aspects, the solution I propose is again to bring to the fore all of the reality and context surrounding the genocide. This can be achieved by stressing the ultimate goals of the provisions that contain these aspects: maximum community participation in the *Gacaca* process and restoration of national unity and reconciliation among Rwandans.

Last but not least, the modern *Gacaca* embeds also some aspects pertaining to political discourse: testimony about genocide as responsibility of every Rwandan, eradication of the culture of impunity, call for exclusive responsibility of Rwandans to solve genocide-related problems and mandatory participation in the *Gacaca* court activities. Most of these aspects are mere products of political discourse that calls for more commitment by the Rwandan population to the *Gacaca* process. In their translation, the most appropriate solution I recommend to the translator is to acknowledge that these are matters of political discourse intended to uphold traditional values and practices that traditionally characterised the Rwandan population. It is therefore important to understand that these are initiatives by the Government of Rwanda intended to seek for home-grown solutions to Rwanda's problems. In this regard, the translator will need to bring these ideas accurately to the fore to inform the target reader of the modern *Gacaca* law.

By and large, on the basis of the literature, theoretical orientations and many other dimensions that guided all the analyses, my main recommendation to the translator of the modern *Gacaca* is to provide some additional information in square brackets as an ante-position to any problematic aspect in order to explain the role these aspects play in the law. To be more specific, the translation of all these elements requires sufficient information on the Rwandan culture, society, reality and the context of the 1994 genocide against the Tutsi. The same solution may apply in the translation of other customary laws. What matters is to consider all the elements underlying their nature and context of their existence.

After successful rendition of customary laws into the target languages, and after taking into consideration all their socio-cultural and contextual aspects, I find these laws very efficient legal instruments that are powerful enough to regulate human behaviours in many contemporary societies. In the case of *Gacaca* law, its accurate translation into English and French can facilitate its transferability and adaptability to a wider range of contexts. My contribution to the translatability of the modern *Gacaca* law was to devise a translational problem-solving model beyond Rwanda's boundaries that sheds more light on the nature of *Gacaca*, and its adaptability to the contemporary context. As the law stands now, it is not an all-purpose solution to all judicial problems. However, the translation I have produced is a useful instrument that can guide legal drafters and translators to create legal apparatuses that can serve to handle other similar cases of genocide or human rights abuses that have happened or might take place elsewhere in the world.

Base Documents and Reference

Base Documents

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About the Book

The Rwandan justice system known as *Gacaca*, originally preserved by word of mouth, was revived, documented, tested and used successfully to handle millions of legal cases in the aftermath of the Rwandan genocide against the Tutsi.

This monograph entitled, *Practical Challenges in Customary Law Translation: The Case of Rwanda's Gacaca Law* starts by depicting the general picture of customary law and ponders on the practical challenges in the production of the modern *Gacaca* law in three versions, i.e. Kinyarwanda, French and English.

The author shows that translation involves language use and transfer, as well as communication within a cultural setting. The book amply demonstrates that nobody should downplay linguistic, textual, contextual and cultural cues in translation. It also shows that the cultural turn in translation has transformed and re-conceptualised the translation theory to integrate non-western thought about translation so as to challenge the presuppositions that have dominated the translation discipline since time immemorial. The major theme that runs through this book is that translation as a mediating form between cultures and contexts should not overlook cultural differences because language is a marker of identity.

The book proves useful to academics, students and translators who engage in teaching, learning, and/or researching on the translation of legal documents, as well as to those who undertake translation tasks.

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